TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 71.

DANIEL F. BLAKE, AS TRUSTEE IN BANKRUPTCY OF WALKEEN-LEWIS MILLINERY COMPANY, APPELLANT,

vs.

WILLIAM OPENHYM & SONS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 8, 1908.

(21,008.)

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SUPREME COURT OF THE UNITED STATES

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vs.

WILLIAM OPENHYM & SONS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1909.

1 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1907, of said Court, begun and held at the United States Court House, in the City of Denver, Colorado, on the first Monday in September, to-wit: the second day of September, A. D. 1907, and which said September Term, 1907, was adjourned from the City of Denver, Colorado, to the City of St. Paul, Minnesota, as provided by law, before the Honorable Walter H. Sanborn and the Honorable William C. Hook, Circuit Judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest:

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered, that heretofore and on the 16th day of July, A. D. 1906, a transcript of record was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to an appeal from the District Court of the United States for the Western District of Missouri, in a certain cause wherein William Openhym and Sons, were Appellants and Daniel F. Blake, Trustee in Bankruptcy in the Matter of Walkeen-Lewis Millinery Company, Bankrupt, was Appellee.

That pursuant to an appeal to the Supreme Court of the United States from the decree of the Circuit Court of Appeals the following transcript of record has been prepared in accordance with General Orders in Bankruptcy, No. 36, and the præcipe of counsel for the appellant, Daniel F. Blake, Trustee, etc.

2 On December 21st, 1905, Intervening Petition of Wm. Openhym & Sons was filed in the words and figures as follows, to-wit:

Before Honorable T. T. Crittenden, Referee in Bankruptcy.

In the District Court of the United States for the Western Division of the Western District of Missouri.

In the Matter of THE WALKEEN-LEWIS MILLINERY COMPANY, In Bankruptcy.

Bankrupt.

Intervening Petition of William Openhym & Sons.

Now come Wm. Openhym & Sons and respectfully represent that on the 12th day of August, 1905, Thad B. Landon was appointed Receiver of the Bankrupt Company by the Honorable H. L. Mc-

Cune, Judge of the Circuit Court of Jackson County at Kansas City, Missouri, and said Landon qualified as Receiver, and took possession of all the assets of the bankrupt company as such receiver under the direction and supervision of the Circuit Court of Jackson County at Kansas City, Missouri.

That on the 15th day of August, 1905, an involuntary petition in bankruptcy was filed in the Western Division of the Western District of the United States District Court in the State of Missouri. That on the 21st day of August, your petitioners obtained from the Honorable H. L. McCune, Judge of said Circuit Court of Jackson County, Missouri, permission to file, maintain and prosecute a replevin suit in said Circuit Court of Jackson County at Kansas City, Missouri, against the bankrupt herein, and said Thad B. Landon, Receiver to recover from said Bankrupt and Receiver, certain articles of merchandise, possession of which intervening petitioners herein were entitled to, because the same had been wrongfully, unlawfully and fraudulently obtained from them by said Bankrupt.

The items of goods claimed to have been owned by intervening petitioners in said replevin are listed and appear in Exhibit A hereto attached and made a part hereof.

That the intervening petitioners filed said replevin suit and gave a bond in double the value of the goods sought to be replevined by them as required by the laws of the State of Missouri. That the writ of replevin was issued to the Sheriff of Jackson County, Missouri, who upon receipt of the same, on said 21st day of August, 1905, took from the possession of the Bankrupt herein and the Receiver, Thad B. Landon, a lot of merchandise and personal property, a complete list of which is hereto attached and marked Exhibit B.

Petitioners further state that after possession of said goods had been taken under the writ of replevin by the Sheriff of Jackson County, Missouri, the Receiver of the Bankrupt, gave a re-
3 delivery bond for said goods as permitted by the laws of the State of Missouri, and said goods and personal property were thereupon surrendered by the Sheriff to said Receiver.

Petitioners further state that under the order made by the Circuit Court of Jackson County, the business of the Bankrupt, that of wholesale millinery, was continued in operation; goods were being sold in the regular course of trade; the business was conducted as it had been in the past by the Receiver; the goods taken by the Sheriff mentioned herein, after the re-delivery bond was given, were replaced in the stock of merchandise then in the possession of the Receiver, and much of the same was sold at a profit by said Receiver.

That on the 23rd day of September, 1905, the Walkeen-Lewis Millinery Company was adjudged a bankrupt; that on the 23rd day of August, the Receiver, Thad B. Landon resigned and John D. Townsley was appointed by the Circuit Court of Jackson County as his successor and as Receiver. That said John D. Townsley conducted said business as it had been conducted before proceedings were brought against the bankrupt,—goods being sold in the ordinary

course of trade appointed by the Circuit Court of Jackson County, Missouri, only and at a profit.

That thereafter Daniel F. Blake was appointed Trustee in Bankruptcy by the creditors of said bankrupt, and said Trustee in Bankruptcy continued the business of the bankrupt as a running business, selling merchandise, including the goods replevined by the petitioners, and obtained by the Receiver under a re-delivery bond as stated herein. That said business was conducted by the Trustee in Bankruptcy until October 2nd when all the assets of the bankrupt, including cash realized from previous sale, and the unsold portion if any of the intervenor's goods replevined, were sold by order of this Court, and purchased by officers and directors of the Bankrupt Company.

That the purchasers of said assets, as stated, at the times hereafter mentioned, when said goods were wrongfully obtained from your petitioners by the Bankrupt Company, were officers of said Company, and had knowledge of the misrepresentations and fraud perpetrated by the Bankrupt Company on the petitioners herein.

Petitioners state that on the 7th day of July 1905 they received from the Bankrupt Company a statement in writing showing the assets and liabilities of said Company; that said statement was sent by the Bankrupt through C. M. Lewis, Secretary and Treasurer
4 of said Bankrupt Company. That in said written statement, said C. M. Lewis, and said Bankrupt, represented that they had assets on July 7th, 1905, worth $105,321.08 and had liabilities aggregate $42,159.43, leaving a net worth of the Bankrupt Company at the sum of $63,161.65.

That on the 13th day of July, 1905, your petitioners obtained a written statement of the Bankrupt Company made by the President of said Company, J. M. Walkeen; that said written statement shows that the total assets of the bankrupt company on the 1st day of July, 1905, amounted to $105,321.08; and that the liabilities on said date amounted to $42,159.43.

That at the time petitioners received said statements as to the financial condition of the bankrupt, the bankrupt was not indebted to your petitioners in any sum; that the bankrupt purchased a large quantity of merchandise from petitioners and wanted to purchase the same on a credit basis; that before extending credit to the bankrupt, petitioners insisted on having a written statement as to the financial condition of said bankrupt, and that the statement mentioned herein was made by the bankrupt for the purpose of obtaining goods on credit from your petitioners. That said statement was false and known to be false by the bankrupt when made and delivered to your petitioners. That your petitioners at the time mentioned herein believed said statement to be absolutely true, and relying upon the same they shipped to the bankrupt company from New York City to Kansas City, Missouri, on the 17th day of July 1905, a bill of merchandise, the items of which are set out in full in Exhibit A hereto attached.

That said merchandise reached Kansas City, about the 22nd or 25th of July, and in less than three weeks thereafter, the Bankrupt

herein acknowledged its insolvency and the receiver was appointed to take charge and possession of all its assets.

Petitioners further state that immediately upon learning of the falsity of the statement made to them as stated herein, they demanded the return to them of the goods fraudulently and wrongfully obtained from them, and insisted on the rescission of the contract of purchase that had been made.

Petitioners further state that the total value of the goods wrongfully obtained from [then] as stated herein, amounted to the sum of $3125.74. That the value of the goods replevined by them, and which were re-taken by the Receiver as stated herein, and the sum of the proceeds realized from the sale of the same now in the hands of the Trustee in Bankruptcy, amounted to the sum of $2582.80.

5 Petitioners further state that nine tenths of the personal property and merchandise replevined by them, and taken by the Sheriff of the possession of the Receiver, as stated herein, was uncut and in the original packages and boxes they were placed in when shipped to the bankrupt by your petitioners herein.

Petitioners further state that after the filing of the replevin suit, and after the Walkeen-Lewis Millinery Company had been adjudged a bankrupt, and after all the assets had been sold by the Trustee in Bankruptcy, said Trustee in Bankruptcy filed a petition in the United States District Court herein for the purpose of staying further proceeding on the part of the Circuit Court of Jackson County at Kansas City, Missouri, in said replevin suit, and the petitioners herein were enjoined [from] further prosecuting said suit, and they were given permission by said Court to file their intervening petition herein for the value of said goods replevined by your petitioners as stated herein.

Wherefore your petitioners pray that they be allowed as a preferred claim against the estate of the bankrupt the sum of $2582.80 being the value of the merchandise replevined by them as stated herein, and retaken from the Sheriff by the Receiver, depositing with said Sheriff a re-delivery bond, and that the Trustee be ordered to pay the value of said goods and merchandise to your petitioners as a prior claim and in full.

That the difference between the value of said goods mentioned herein recovered in said replevin suit, and the value of the total bill of goods shipped to the Bankrupt by your petitioners, be allowed as a general claim against the estate to participate in dividends the same as the claims of all other creditors.

I. J. RINGOLSKY,
Atty. for Petitioners.

STATE OF MISSOURI.
County of Jackson, ss:

I. J. Ringolsky having first been duly sworn upon his oath states that he knows the facts contained in the foregoing petition; that he is the agent and attorney for the petitioners and makes this

affidavit on their behalf. That the facts contained in the foregoing petition are true as he verily believes.

I. J. RINGOLSKY.

Subscribed and sworn to before me this 20 day of December A. D. 1905.

[SEAL.]

M. F. RINGOLSKY,
Notary Public, Jackson County, Mo.

My commission expires Feb. 6 09.

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EXHIBIT A.

Case No.	Quality.	Pieces.	Color. Articles.	Yards.	Price.	Amount.
5120	275/29	56	Colored Velvet	1268	35	443.80
5185	"	48	" "	1109-3	35	388.28
5185	290	8	Black "	1986	35	69.56
5250	375	5	Colored "	108-4	35	37.98
5250	290	28	Black "	663-5	35	232.27
5375	375	17	Colored "	394-4	35	138.08
5375	290	14	Black "	339-4	35	118.32
	3512	50	" & Col. Jap Silk	2467-4	25	616.88
	553	11	Colored Velvet	140-4	1.05	147.53
	375/29	13	" "	291-2	35	101.94
	236	10	Black Veiling	154-7	10	15.49
	237	10	" "	129-4	09	11.65
	238	10	" "	311	10	31.10
	239	10	" "	199	12-5/8	25.13
	240	18	Colored "	283-7	19	53.84
	241	10	Black "	163-6	7-3/4	12.69
	242	10	" "	142-4	8-1/2	12.11
	243	20	Colored "	320-2	9-1/2	30.43
	244	10	Black & White "	151-4	7-7/8	11.93
	245	10	" " " "	137-4	12-3/8	17.01
						221.48
				Less 10%		22.14
						199.34
				Less 10%		19.93
						179.41
	900	40	Illusion	1022-2	9-1/2	97.12
	3875	16	Col. Chiffon Veil	424-5	22-1/2	95.55
	3857	90	" " "	1325-7	11	145.86
						517.94
	JJ/M	5	Sewing Silk "	116-4	9-1/2	11.07
	619	1	Blck 36 in. Silk	61-4	85	52.28
	3092	1	" " " "	63-7	35	22.36
	375/29	32	Fancy Col. Velvet	369	45	166.05
	553	5	Colored "	58	1.05	60.90
						3125.74

Exhibit B.

Chiffon Veiling #3857. Factory Lengths.

Color.	No. of yards marked.
Brown	15-15-15-15-16-2/8, 16-2/8, 16, 16, 15, 15, 15, 15, 16, 16, 15, 15, 15, 15,
Navy	15, 15, 15, 15, 16, 16, 15-7/8, 15
White	17, 17, 14, 14, 14, 14, 17, 17, 18, 18, 13, 13, 12, 12, 12, 13, 13, 17, 17, 13, 13, 13, 13, 18.
Black	14, 14, 14, 14, 14, 14, 14, 9-5/8, 14, 14, 15, 15, 15, 15, 15, 15, 14, 15, 15, 14, 14, 15, 15, 15, 14.

Illusion or sewing silk veiling #900.

White	25, 25, 25, 25, 24, 25, 25, 25, 25, 25, 25.
Brown	23-4/8, 25, 25, 25, 25, 25, 25, 25, 25.
Navy	25, 25, 25, 25, 24-6/8, 29-4/8, 25, 25, 25, 20, 14.
Black	25, 25.

Veiling, #238.

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Black	15-7/8, 15-5/8, 15-5/8, 15-5/8, 15-5/8, 15-5/8, 16-1/8, 16-3/8, 15-1/8, 15-5/8.
White	15-7/8, 14-2/8, 13-5/8, 14-4/8, 15-1/8, 16-1/8, 16-1/8, 16-1/8, 16-1/8, 15-7/8.

Veiling #241.

Black & White 16-2/8, 16-3/8, 13/18, 15-6/8, 16-1/8, 14-2/8, 15-3/8, 16-7/8, 16-3/8, 13-1/8, 14-2/8.

Veiling #240.

White	14-2/8, 15-2/8, 15-2/8, 15-2/8, 13-1/8, 13-1/8.
Black	17-4/8, 17-4/8, 16-3/8, 15-2/8, 16-3/8, 15-5/8.
Brown	16-3/8, 16-3/8, 17-4/8, 15-2/8, 16-3/8, 16-3/8.

Veiling #239.

Black 20-6/8, 20-6/8, 19-6/8, 19-6/8, 19-6/8, 19-6/8, 20-6/8, 20-6/8, 18-4/8.

Veiling #242.

Black 15-3/8, 14-2/8, 14-2/8, 14-2/8, 14-2/8, 14-2/8, 14-2/8, 14-2/8, 14-2/8.

Veiling #243.

Black	14-1/8, 14-1/8, 14-1/8, 14-1/8, 14-1/8, 14-1/8, 14-1/8, 10-6/8, 14-1/8.
White	18, 18, 18, 18, 18, 18, 18, 18, 18.

Ex. B.—2—

Quality #375; Colored Silk Velvet (original packages).

Color.	No. Yards marked.
Brown	23-6/8, 23-4/8, 21-2/8, 23-5/8, 21-2/8, 20-1/8, 23-1/8, 19-1/8, 20-1/8.
Seal	22-7/8, 23-2/8, 22, 22/58, 22-7/8, 22-1/8, 22, 22-1/8, 23-5/8.
Tobac	19-7/8, 22-6/8, 22-1/8, 22-3/8, 22, 23-3/8, 19-3/8, 22-6/8
Sage	22-1/8, 22-6/8, 22-3/8, 22-6/8, 22-5/8.
Chasseur	25, 23-6/8, 23-1/8.
Willow	24-1/8, 23-6/8, 23-5/8, 24-2/8.
Reseda	21-3/8, 22, 23-1/8, 24-1/8, 23-5/8.
Olive	25-3/8, 23, 25-2/8, 25-3/8.
Mousse	24-5/8, 24-7/8, 25-3/8.
Nile	24.
Leghorn	22-2/8.
Lt. Blue	22-5/8.
Beige	19, 1/8, 22-3/8.
8	
V. Rose	23-7/8.
Pink	17-3/8.
Cream	21-7/8, 21-6/8.
Champagne	23.
Scarlet	23-5/8, 22-7/8, 20.
Cardinal	23-2/8, 23-2/8, 22-3/8, 23-5/8, 23-1/8, 23-3/8, 18-2/8, 23-1/8, 23-1/8.
Garnet	25-3/8, 26-5/8, 26-5/8.
White	21-1/8, 21-1/8, 23-5/8.
Royal	23-1/8, 26-3/8.
Navy	21-7/8, 23-1/8, 24-5/8, 21-1/8, 23-6/8, 24-2/8, 21-2/8, 22, 20-7/8, 20-2/8, 23-5/8.
Black	23-5/8, 22-7/8, 19-6/8, 23-1/8, 27, 27, 24, 24, 24-5/8, 22-6/8, 24-5/8, 26-1/8, 22-1/8, 24-7/8, 26-2/8, 24-3/8, 24-6/8, 26-6/8, 24-6/8, 27-2/8, 22-6/8, 27-1/8, 23-7/8, 24-5/8, 21-2/8, 24-6/8, 24-5/8, 22-7/8 1 piece measured 21-1/8.

Prism Fancy Velvet. (Original Packages.)

Black	13-1/8, 12-1/8, 12-1/8.
Brown	11-6/8.

Ex. B.—2—(Continued).

Prism Fancy Velvet (Original Packages) (Continued).

Parsifal 11-2/8.
Navy 12.
Sage 12.
Pink 11-3/8.
Lt. Blue 11-3/8
Cardinal 6-5/8
Steel 8-1/8
Nile 11-3/8
Violet 11-6/8
Cream 12-4/8
Alice 13
Chasseur 12-6/8.
Champaigne 12-2/8

Ex. B.—3—

Quality #375 Colored Velvet (Measured)

Champaigne 15
Pink 11-3/8
Lilac 9
White 21-5/8, 14-4/8
Mousse 15, 13-4/8
Cardinal 11-4/8

9

Cream 18-2/8
Sage 2-5/8, 22
Navy 19-6/8
Mais 22
Garnet 8-4/8
Nile 6
Olive 14-4/8
Steel 22-2/8, 15-4/8, 23-2/8
Leghorn 7
Violet 24
Royal 12-6/8
V. Rose 6-3/8
Bercetisse 13. 4-5/8. Box #244359 with
Lead 17, 20
Scarlet 20, 23-4/8
Brown 17-6/8
Helio 20
Beige 10-3/8
Willow 14-4/8
Reseda 23, 11
Chasseur 21-6/8, 26-1/8
Tobac 20, 18-6/8
Pink 19-4/8

Lt. Blue 12-4/8, 21
Seal 18
Parsifal 12-2/8
Alice 21

Quality #3512, 36-inch Jap. Silk, Original Packages.

Color.	No. yards marked.
Champagne	49-3/8, 49-5/8, 48-3/8
Beige	49-5/8
Reseda	49-3/8, 50-3/8
White	48-6/8, 47-2/8, 48-6/8, 49-4/8, 48-6/8, 49-6/8, 49-6/8
Olive	49-2/8, 49-4/8
ClCiel	49-2/8, 49-5/8, 49-1/8
Navy	49-4/8, 48-4/8, 49-6/8
Black	49-2/8, 49-6/8, 49-6/8, 49-3/8, 49, 49, 49-6/8, 49-3/8, 49-6/8
Scarlet	49-3/8
Cardinal	49-6/8, 50, 50
Pink	49, 49-6/8
Old Rose	49-3/8
Turquoise	50
Brown	49-4/8, 49-3/8, 49-5/8
Ivory	50-1/8, 49, 46-5/8, 49-2/8, 49-4/8
National	50

10

Marine 49-5/8
Ivory 39-7/8. Cut and measured.

#3092 Tappentine.

Black 7-7/8 Cut and measured.

#619 Black Tappeta

Black 36-6/8, Cut and measured.

B.—4—

#245 Veiling. (Original packages.)

Color.	No. Yards marked.
Black & W.	13-6/8, 13-6/8, 13-6/8, 13-6/8, 13-6/8, 13-6/8, 13-6/8, 13-6/8, 13-6/8, 13-6/8.

#241 Veiling. (Original packages.)

Black 16-3/8, 16-3/8, 16-3/8, 16-3/8, 16-3/8, 16-3/8, 16-3/8, 16-3/8, 16-3/8, 16-3/8, 16-3/8.

#236 Veiling. (Original packages.)

Black 15-3/8, 15-3/8, 15-3/8, 15-3/8, 15-3/8, 15-3/8, 15-3/8, 15-3/8, 15-3/8, 15-3/8, 16-1/8.

#237 Veiling. (Original packages.)

Black 12-7/8, 12-7/8, 12-7/8, 12-5/8, 13-1/8, 13-1/8, 13-1/8, 13-1/8

#553 Colored Velvet. (Cut pieces measured).

Cardinal 11
Beige 9-6/8
Alice 9-1/8
Brown 4-6/8
Prune 10
Reseda 11 10-1/8, 11
Lt. Alice 10-6/8
Castor 11
V. Rose 11, 12-2/8
Grey 8
Lilac 8-6/8
Bronze 2-1/8
Sapphire 6-1/8

Prism Fancy Velvet. (Cut pieces measured).

Violet 10-1/8
Chasseur 7-7/8
Brown 1-6/8

11

Navy 4-6/8
Parsifal 7-6/8
Cream 5-1/8
Black 5
Pink 12
Cardinal 3-1/8
Sage 1-1/8
Steel 3-2/8
Lt. Blue 9-2/8
Nile 7-1/8
Champaigne 5-1/8

#4697 Chiffon Veiling (Cut pieces measured).

White 29-1/8, 69-1/8
Navy 15-2/8, 68.

#3875 Chiffon Veiling (Cut and full, cut pieces measured).

Black	45-1/8, 60-6/8
White	35, 50-2/8
Grey	26, 27-1/8
Navy	50-1/8
Brown	49, 50-2/8

(Decree U. S. District Court.)

In the District Court of the United States for the Western Division of the Western District of Missouri.

In the Matter of WALKEEN-LEWIS MILLINERY COMPANY, Bankrupt.

WILLIAM OPENHYM & SONS, Claimant.

In Bankruptcy.

Order.

This cause having been certified by the Referee in Bankruptcy to this court for review on exceptions taken to the action of the Referee in allowing against the estate in bankruptcy the claim of William Openhym & Sons, in the amount of $2582.80, as a preferred claim, and after due hearing and consideration thereof:

It is ordered by the court that the exceptions to the said action of the Referee be and the same are hereby sustained, and the said allowance in the sum of $2582.80 as a preferred claim against the bankrupt estate be and the same is disapproved; and the matter is referred back to the Referee in Bankruptcy with directions to vacate the order allowing said preferential claim, and to allow the same as that of a general creditor of the estate.

It is further ordered that the costs of this proceeding be taxed against the said William Openhym & Sons.

JNO. F. PHILLIPS, *Judge.*

Said Order was filed April 30, 1906.

12 *(Findings of Fact and Conclusions of Law.)*

And on the twenty-first day of January, A. D. 1908, there was filed as of November ninth, A. D. 1907, a findings of fact and conclusions of law by said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

13 United States Circuit Court of Appeals, Eighth Circuit.

No. 2467.

WILLIAM OPENHYM & SONS, Appellants,
vs.
DANIEL F. BLAKE, Trustee in Bankruptcy of Walkeen-Lewis Millinery Company, Bankrupt, Appellee.

This is an appeal by William Openhym & Sons from an order of the District Court of the United States for the Western District of Missouri, sitting as a court of bankruptcy, denying an application for the allowance of their claim as a preferred one against the estate of the Walkeen-Lewis Millinery Company, bankrupt. The order appealed from being reversed with direction to allow the claim as prayed for, the Circuit Court of Appeals of the Eighth Circuit upon consideration of the record and at the request of the appellee, the trustee in bankruptcy, makes the following findings of fact and conclusions of law:

Findings of Fact.

1. William Openhym & Sons were importers and manufacturers of silks and ribbons at New York City. The Walkeen-Lewis Millinery Company, a corporation, was engaged in the wholesale
14 millinery business at Kansas City, Missouri. In July, 1905, in order to obtain credit in the purchase of goods the Millinery Company submitted to Openhym & Sons a statement purporting to show its assets and liabilities. The statement was not satisfactory to Openhym & Sons, and in response to a request for a more specific showing of financial condition the president of the Millinery Company, being then in New York to make purchases, prepared and delivered a second statement dated July 13, 1905. Both of these statements showed the net worth of the Millinery Company to be $63,161.65 above all liabilities. The president of the company also made certain oral representations to Openhym & Sons.

2. Openhym & Sons relying upon the statements and representations and believing them to be true sold and shipped to the Millinery Company goods amounting to $3125.74. The goods arrived in Kansas City the latter part of July 1905.

3. On August 12, 1905, in a suit brought by another person, a state court in Kansas City, Missouri, appointed a receiver of all of the property of the Millinery Company who forthwith took possession thereof and under the orders of that court continued the sale and disposition thereof through traveling men and otherwise until September 25, 1905.

4. On August 15, 1905, certain creditors of the Millinery Company filed a petition in the District Court of the United States for the Western District of Missouri to have it adjudged bankrupt. Four

days later the directors of the company met and adopted a
15 resolution admitting its insolvency and inability to pay its debts and consenting that it be adjudged bankrupt.

5. On August 21, 1905, Openhym & Sons, who had learned of the filing of the petition in bankruptcy six days previously, asserted that the statements and representations made them and upon which they were induced to part with their goods were false in material particulars and they demanded possession of the goods from the state court receiver who then had the stock. Possession was refused. On the same day, August 21, 1905, they obtained from the state court permission to sue its receiver and the Millinery Company in replevin for the possession of the goods, and on the same day they brought such an action. Process was duly served on both defendants. In the execution of the replevin writ but $2582.80 worth of the goods obtained from Openhym & Sons were found. The sheriff in executing the writ separated the goods so found from the remainder of the stock then in possession of the state court receiver and took them into his own possession. The receiver thereupon gave a redelivery bond, resumed possession of the goods, put them back into the stock, and continued sales therefrom.

6. The statements and representations made by the Millinery Company to Openhym & Sons were false in material particulars and were fraudulently made for the purpose of obtaining credit which could not have been obtained if the facts respecting its true financial condition had been known. Between July 13, 1905, when
16 the last statement showing net assets of the company amounting to $63,161.65 was made, and August 19, 1905, when the company adopted a resolution admitting insolvency, there had been no noteworthy or exceptional losses. In the making of the statements and representations information was suppressed by the Millinery Company of the fact that it had outstanding $11,000 of notes for borrowed money. It also stated that it was not behind in its payments, whereas in fact it owed $5000 on past due accounts.

7. On September 23, 1905, the Millinery Company was adjudged bankrupt by the District Court of the United States for the Western District of Missouri. Between the filing of the petition in bankruptcy on August 15th and the date of the adjudication no receiver was appointed by that court and no order was made affecting the custody of the property in the possession of the state court or the continuance of the sales thereof by the state court receiver. But on the day of the adjudication, September 23, Daniel F. Blake, the appellee, was appointed receiver in bankruptcy and was directed to apply to the state court for an order upon its receiver for the possession of the property, and that before taking possession he should request the state court to fix and determine the liabilities which its own receiver had incurred for the benefit of the estate. The order of direction to the receiver in bankruptcy contained this clause: "The liabilities incurred by the said receiver appointed by said court, which are fixed and allowed by said state court, shall be assumed and paid by the receiver herein."

17 8. September 25, 1905, the state court ascertained and stated various liabilities incurred by its receiver, giving the

names of the parties to whom owing and the amounts, and in addition thereto recited the proceedings in the replevin action brought by Openhym & Sons, that its receiver had executed a redelivery bond and had retained the property involved and found that whatever liability was incurred under the redelivery bond was incurred for the benefit of the estate. The state court thereupon ordered the surrender of all of the assets of the estate to the receiver in bankruptcy with a provision that the latter should assume and pay the liabilities recited and also all liability arising under the redelivery bond. The property was delivered to the receiver in bankruptcy under these conditions.

9. When the sheriff executed the replevin writ he found and took possession of goods of the value of $2582.80 that had been obtained of Openhym & Sons by the mis-representations above referred to. These goods were turned back to the state court receiver pursuant to the redelivery bond and were covered into the general stock from which sales were made in the usual course of business by the state court receiver down to the time of the surrender of possession to the receiver in bankruptcy. It was not shown what part of the goods in controversy actually passed into the possession of the receiver in bankruptcy, but it was shown that all of the stock remaining unsold and all of the proceeds of sales by the state court receiver, largely in the form of customer's accounts, were, less
18 expense of conducting the business, turned over to the receiver in bankruptcy.

10. October 2, 1905, the receiver in bankruptcy sold all of the property of the bankrupt Millinery Company. October 13, 1905, Blake, the receiver, was selected as trustee. October 27, 1905, the District Court ruled Openhym & Sons to show cause November 2 why they should not be enjoined from prosecuting their replevin action in the state court, and it temporarily enjoined them from continuing such prosecution. December 1, 1905, the temporary injunction was made permanent.

11. On December 10, 1905, a dividend upon claims allowed against the estate of the Millinery Company, bankrupt, was declared, but its payment left the greater portion of the estate in the hands of the trustee. The fact that Openhym & Sons had not up to that time intervened in the bankruptcy proceedings and presented their claim for a preferential allowance had no effect upon the declaration of the dividend or upon the amount thereof. No creditor was prejudiced by their delay in intervening.

12. December 21, 1905, Openhym & Sons presented their intervening petition to the District Court for the allowance of their claim for $2582.80 as a preferred one. March 24, 1906, the referee in bankruptcy found that the interveners were entitled to a preferential allowance out of the funds in the hands of the trustee. The trustee presented a petition to review and the District Court reversed the action of the referee.

19 *Conclusions of Law.*

1. There were sufficient grounds for a rescission of the sale by Openhym & Sons, the right of rescission was seasonably asserted, and the right was not impaired or destroyed by the commencement of bankruptcy proceedings against the vendee who obtained the goods by fraud. The receiver and trustee in bankruptcy had no greater right or title to the goods in controversy than the bankrupt had.

2. It was competent for the bankruptcy court to permit the prosecution of the replevin action in the state court for the recovery of the goods. The continuance of such prosecution was lawful up to the time it was forbidden by the injunction of the bankruptcy court. The commencement and prosecution of that action, though subsequently enjoined, was available to Openhym & Sons as an act of recission, and the proceedings therein could properly be resorted to in ascertaining what part of the goods sued for was in the possession of the state court and afterwards with proceeds of sales went into the possession of the bankruptcy court.

3. There was no such delay by Openhym & Sons in intervening in the bankruptcy proceedings as estopped them from asserting their right to a preferential claim for the value of their goods.

4. Openhym & Sons are entitled to an order that the trustee pay their claim out of funds in his hands before making further payments to general creditors.

WALTER H. SANBORN,
WILLIAM C. HOOK,
Judges United States Circuit Court of Appeals, Eighth Judicial Circuit.

[Endorsed:] No. 2467. William Openhym, *et al.*, Appellants, *vs.* Daniel E. Blake, Trustee &c. Findings of Fact and Conclusions of Law by U. S. Circuit Court of Appeals. Filed Jan. 21, 1908, as of Novr. 9, 1907. John D. Jordan, Clerk.

20 *(Decree U. S. Circuit Court of Appeals.)*

On the ninth day of November, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1907.

SATURDAY, *November*, 9, 1907.

WILLIAM OPENHYM AND SONS, Appellants,
vs.
DANIEL F. BLAKE, Trustee in Bankruptcy in the Matter of Walkeen-Lewis Millinery Company, Bankrupt.

Appeal from the District Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that William Openhym and Sons have and recover against Daniel F. Blake, Trustee in Bankruptcy in the Matter of Walkeen-Lewis Millinery Company, Bankrupt, the sum of Two Hundred Fifty-Six and 75/100 Dollars for their costs in this behalf expended and that the same be paid by said Trustee as a part of the cost of the administration of said Bankrupt estate.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to allow the claim of appellants as prayed for.

November 9, 1907.

21 (*Petition for and Order Allowing Appeal to Supreme Court of the United States.*)

And on the ninth day of December, A. D. 1907, a petition for and order allowing appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2467.

WILLIAM OPENHYM & SONS, Appellants,
vs.
DANIEL F. BLAKE, Trustee in Bankruptcy in the Matter of Walkeen-Lewis Millinery Company, Appellee.

Petition for Appeal to the Supreme Court.

The above mentioned Daniel F. Blake, trustee as aforesaid, appellee in this court, respectfully shows that the amount in con-

troversy herein exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States, in that the validity of a statute of and an authority exercised under the United States was drawn in question; and there was also drawn in question the validity of a statute of, and an authority exercised under, a state on the ground of repugnancy to the constitution, and laws of the United States; and a title, right, privilege and immunity was claimed under the constitution of, statute of, and a commission held, and authority exercised under, the United States and decided against.

Wherefore the aforesaid appellee herein prays that an appeal be allowed him in the above entitled cause, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors filed herein may be reviewed.

EDWIN A. KRAUTHOFF,
Attorney for Appellant (Appellee in this Court).

22 It is hereby ordered that the appeal hereinabove prayed to the Supreme Court of the United States be allowed as prayed, the same to operate as a supersedeas.

WALTER H. SANBORN,
WILLIAM C. HOOK,
Judges United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) No. 2467. William Openhym and Sons, Appellants, *vs.* Daniel F. Blake, Trustee &c. Petition for and Order allowing Appeal to Supreme Court of the United States. Filed Dec. 9, 1907. John D. Jordan, Clerk.

(*Assignment of Error.*)

And on the ninth day of December, A. D. 1907, an assignment of error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2467.

WILLIAM OPENHYM & SONS, Appellants,
vs.
DANIEL F. BLAKE, Trustee in Bankruptcy in the Matter of the Walkeen-Lewis Millinery Company, Bankrupt, Appellee.

Assignment of Errors.

Now comes Daniel F. Blake, trustee as aforesaid, appellee in this Court, appellant to the Supreme Court of the United States, and files the following assignment of errors to the decree of the court in

the above entitled cause, and upon which he relies for grounds of reversal on appeal:

1. The Circuit Court of Appeals erred in not affirming the decree and order of the District Court.

EDWIN A. KRAUTHOFF,
Attorney for Appellant, Daniel F. Blake, Trustee, etc.

23 (Endorsed:) No. 2467. William Openhym & Sons, *vs.* Daniel F. Blake, Trustee &c. Assignment of Error. Filed Dec. 9, 1907. John D. Jordan, Clerk.

(Citation on Appeal.)

And on the twenty-seventh day of December, A. D. 1907, a citation on appeal was filed in said cause, the original of which with acceptance of service endorsed thereon, is hereto attached and herewith returned:

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States to William Openhym & Sons, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington in the District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Daniel F. Blake, as trustee in bankruptcy of Walkeen-Lewis Millinery Company, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter H. Sanborn and Honorable William C. Hook, Judges of the United States Circuit Court of Appeals for the Eighth Circuit, this 9th day of December, A. D. 1907.

WALTER H. SANBORN,
WILLIAM C. HOOK,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

Copy notice received this 17 Day of Dec. 1907.

I. J. RINGOLSKY &
MORRIS J. HIRSCH.
Att'ys for Appellant.

[Endorsed:] No. —. Supreme Court of the United States. Daniel F. Blake, Trustee, etc., Appellant, *vs.* William Openhym & Sons. Citation on Appeal. Filed Dec. 27, 1907. John D. Jordan, Clerk.

25 *(Order Enlarging Return Day of Citation.)*

And on the eighth day of January, A. D. 1908, an order enlarging the return day of the citation was made in said cause, the original of which order was transmitted to the Clerk of the Supreme Court and of which the following is a true copy:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 2467.

WILLIAM OPENHYM & SONS, Appellants,
vs.
DANIEL F. BLAKE, as Trustee in Bankruptcy of Walkeen-Lewis Millinery Company, Appellee.

Now on this day, for good cause shown, the undersigned judge who has heretofore signed the citation issued in this cause, does hereby enlarge the time in which the appellants shall docket this case and file the record thereof with the clerk of the Supreme Court of the United States, such enlargement to be for a period of thirty days from this date.

Done at St. Louis, Missouri, January 8, 1908.

(Signed) WILLIAM C. HOOK,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) No. 2467. William Openhym, *et al.*, Appellants, *vs.* Daniel F. Blake, Trustee &c. Copy of Order enlarging return day of Citation. Filed Jan. 8, 1908. John D. Jordan, Clerk.

26 *(Praecipe for Transcript on Appeal to Supreme Court.)*

And on the twenty-seventh day of January, A. D. 1908, a praecipe for transcript on appeal to the Supreme Court was filed in said cause, in the words and figures following, to-wit:

KANSAS CITY, MO., 1-25-1908.

John D. Jordan, Esq., St. Louis, Mo.

DEAR SIR: Referring to the case of Openhym & Sons *v.* Blake, No. 2467, please make a record for the Supreme Court of the United States, consisting of the following:

1. Intervening petition of Wm. Openhym & Sons found in the printed record at page 21;

2. Judgment and decree of Judge Philips, found at page 150 of the printed record;

3. Judgment and decree entered by your court;

4. The finding of facts made in your court:
5. The conclusions of law announced thereon.

Yours truly,

KARNES, NEW & KRAUTHOFF.

Dic. K.

(Endorsed:) No. 2467. William Openhym and Sons, Appellants, *vs.* Daniel F. Blake, Trustee &c. Precipe for transcript on appeal to Supreme Court. Filed Jan. 27, 1908. John D. Jordan, Clerk.

27 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of the Intervening Petition of William Openhym & Sons and the Exhibits thereto; Decree of U. S. District Court; Findings of Fact and Conclusions of Law by U. S. Circuit Court of Appeals; Decree of U. S. Circuit Court of Appeals; Petition for and Order allowing Appeal to Supreme Court U. S.; Assignment of Error; Order enlarging return day of Citation, and Precipe for Transcript on appeal to Supreme Court, in the case of William Openhym and Sons, Appellants, *v.* Daniel F. Blake, Trustee in Bankruptcy in the Matter of Walkeen-Lewis Millinery Company, Bankrupt, No. 2467, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original Citation with acceptance of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-ninth day of January, A. D. 1908.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 21,008. U. S. circuit court appeals, 8th circuit. Term No. 269. Daniel F. Blake, as trustee in bankruptcy of Walkeen-Lewis Milling Company, appellant, *vs.* William Openhym & Sons. Filed February 8th, 1908. File No. 21,008.

APR 28 1909
JAMES H. McKENNEY

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL F. BLAKE, AS TRUSTEE IN BANKRUPTCY OF WALKEEN-LEWIS MILLINERY COMPANY,
Appellant,

vs.

WILLIAM OPENHYM & SONS,
Appellees.

No. [redacted] 71.

Appellees' Motion to Dismiss or Affirm and Brief in Support Thereof.

BENJAMIN N. CARDOZO,
OF COUNSEL.

I. J. RINGOLSKY,
MORRIS J. HIRSCH,
DAVID I. WHITE,
Attorneys for Appellees.

John C. Rovard, Printer, 721 Wall St., K. C., Mo.

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL F. BLAKE, AS TRUSTEE IN BANKRUPTCY OF WALKEEN-LEWIS MILLINERY COMPANY,
Appellant,

vs.

WILLIAM OPENHYM & SONS,
Appellees.

No. 269.

Appellees' Motion to Dismiss or Affirm and Brief in Support Thereof.

MOTION TO DISMISS OR AFFIRM.

Come now the appellees by their counsel appearing in that behalf and move the court to dismiss the appeal in the above entitled cause for want of jurisdiction because the judgment or decree from which said appeal, purports to have been taken is the judgment or decree of the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

And the said appellees by counsel as aforesaid, also move the court to affirm the said judgment or decree from which said appeal

purports to have been taken because although the record in said case may show that this court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

BENJAMIN N. CARDOZO,
I. J. RINGOLSKY,
MORRIS J. HIRSCH,
DAVID I. WHITE,
Counsel for the Appellees for the purposes of these motions.

STATEMENT OF CASE.

The order which the appellant seeks to bring before this court was made by the Circuit Court of Appeals for the Eighth Circuit, on an appeal by William Openhym & Sons the appellees here, from the District Court of the United States for the Western Division of the Western District of Missouri, sitting in bankruptcy.

The facts as found by the Circuit Court of Appeals on the request of the trustee in bankruptcy, the appellant here, are as follows:

"1. William Openhym & Sons were importers and manufacturers of silks and ribbons at New York City. The Walkeen-Lewis Millinery Company, a corporation, was engaged in the wholesale millinery business at Kansas City, Missouri. In July, 1905, in order to obtain credit in the purchase of goods the Millinery Company submitted to Openhym & Sons a statement purporting to show its assets and liabilities. The statement was not satisfactory to Openhym & Sons, and in response to a request for a more specific showing of financial condition the president of the Millinery Company, being then in New York to make purchases, prepared and delivered a second statement, dated July 13, 1905. Both of these statements showed the net worth of the Millinery Company to be $63,161.65 above all liabilities. The president of the company also made certain oral representations to Openhym & Sons.

"2. Openhym & Sons relying upon the statements and representations and believing them to be true sold and shipped to the Millinery Company goods amounting to $3,125.74. The goods arrived in Kansas City in the latter part of July, 1905.

"3. On August 12, 1905, in a suit brought by another person, a state court in Kansas City, Missouri, appointed a receiver of all the property of the Millinery Company who forthwith took possession thereof and under the orders of that court continued the sale and disposition thereof through traveling men and otherwise until September 25, 1905.

"4. On August 15, 1905, certain creditors of the Millinery Company filed a petition in the District Court of the United States

for the Western District of Missouri to have it adjudged bankrupt. Four days later the directors of the company met and adopted a resolution admitting its insolvency and inability to pay its debts and consenting that it be adjudged bankrupt.

"5. On August 21, 1905, Openhym & Sons, who had learned of the filing of the petition in bankruptcy six days previously, asserted that the statements and representations made them and upon which they were induced to part with their goods were false in material particulars and they demanded possession of the goods from the state court receiver who then had the stock. Possession was refused. On the same day, August 21, 1905, they obtained from the state court permission to sue its receiver and the Millinery Company in replevin for the possession of the goods, and on the same day they brought such an action. Process was duly served on both defendants. In the execution of the replevin writ, but $2,582.80 worth of the goods obtained from Openhym & Sons were found. The sheriff in executing the writ separated the goods so found from the remainder of the stock then in possession of the state court receiver and took them into his own possession. The receiver thereupon gave a re-delivery bond, resumed possession of the goods, put them back into the stock, and continued sales therefrom.

"6. The statements and representations made by the Millinery Company to Openhym & Sons were false in material particulars and were fraudulently made for the purposes of obtaining credit which could not have been obtained if the facts respecting its true financial condition had been known. Between July 13, 1905, when the last statement showing net assets of the company amounting to $63,161.65 was made, and August 19, 1905, when the company adopted a resolution admitting insolvency, there had been no noteworthy or exceptional losses. In the making of the statements and representations information was suppressed by the Millinery Company of the fact that it had outstanding $14,000 of notes for borrowed money. It also stated that it was not behind in its payments, whereas in fact it owed $5,000 on past due accounts.

"7. On September 23, 1905, the Millinery Company was adjudged bankrupt by the District Court of the United States for the Western District of Missouri. Between the filing of the petition in bankruptcy on August 15th and the date of the adjudication no receiver was appointed by that court and no order was made affecting the custody of the property in the possession of the state court or the continuance of the sales thereof by the state court receiver. But on the day of the adjudication, September 23, Daniel F. Blake, the appellee was appointed receiver in bankruptcy and was directed to apply to the state court for an order

upon its receiver for the possession of the property, and that before taking possession he should request the state court to fix and determine the liabilities which its own receiver had incurred for the benefit of the estate. The order of direction to the receiver in bankruptcy contained this clause: 'The liabilities incurred by the said receiver appointed by said court, which are fixed and allowed by said state court, shall be assumed and paid by the receiver herein.'"

"8. September 25, 1905, the state court ascertained and stated various liabilities incurred by its receiver, giving the names of the parties to whom owing and the amounts, and in addition thereto recited the proceedings in the replevin action brought by Openhym & Sons, that its receiver had executed a re-delivery bond and had retained the property involved and found that whatever liability was incurred under the re-delivery bond was incurred for the benefit of the estate. The state court thereupon ordered the surrender of all of the assets of the estate to the receiver in bankruptcy with a provision that the latter should assume and pay the liabilities recited and also all liability arising under the re-delivery bond. The property was delivered to the receiver in bankruptcy under these conditions.

"9. When the sheriff executed the replevin writ he found and took possession of goods of the value of $2,582.80 that had been obtained of Openhym & Sons by the misrepresentations above referred to. These goods were turned back to the state court receiver pursuant to the re-delivery bond and were covered into the general stock from which sales were made in the usual course of business by the state court receiver down to the time of the surrender of possession to the receiver in bankruptcy. It was not shown what part of the goods in controversy actually passed into the possession of the receiver in bankruptcy, but it was shown that all of the stock remaining unsold and all of the proceeds of sales by the state court receiver, largely in the form of customer's accounts, were, less expense of conducting the business, turned over to the receiver in bankruptcy.

"10. October 2, 1905, the receiver in bankruptcy sold all of the property of the bankrupt Millinery Company. October 13, 1905, Blake, the receiver, was selected as trustee. October 27, 1905, the District Court ruled Openhym & Sons to show cause November 2, why they should not be enjoined from prosecuting their replevin action in the state court, and it temporarily enjoined them from continuing such prosecution. December 1, 1905, the temporary injunction was made permanent.

"11. On December 10, 1905, a dividend upon claims allowed against the estate of the Millinery Company, bankrupt was declared,

but its payment left the greater portion of the estate in the hands of the trustee. The fact that Openhym & Sons had not up to that time intervened in the bankruptcy proceedings and presented their claim for a preferential allowance had no effect upon the declaration of the dividend or upon the amount thereof. No creditor was prejudiced by their delay in intervening.

"12. December 21, 1905, Openhym & Sons presented their intervening petition to the District Court for the allowance of their claim for $2,582.80 as a preferred one. March 24, 1906, the referee in bankruptcy found that the interveners were entitled to a preferential allowance out of the funds in the hands of the trustee. The trustee prosecuted a petition to review and the District Court reversed the action of the referee." (Record, pp. 12, 13 and 14.)

Thereupon William Openhym & Sons prayed an appeal to the Circuit Court of Appeals, which was allowed. The petition came on for hearing before the Circuit Court of Appeals for the Eighth Circuit, and, at the request of the trustee in bankruptcy, the appellant here, the court made a special finding of facts (Record, pp. 12, 13 and 14), and conclusions of law (Record, p. 15), and made an order reversing the decree of the District Court, and further ordering that the cause be remanded to the District Court with directions to allow the claim of appellants as prayed for (Record, p. 16).

Thereupon the trustee filed his petition for appeal to the Supreme Court, which said appeal was allowed (Record, p. 17).

The appellees now move to dismiss or affirm.

ARGUMENT.

I.

This court will not retain jurisdiction of this case on this appeal, as the appeal was prayed for and allowed under section 25b of the bankruptcy act of July 1, 1898, and the record does not show that such questions were involved in the decision of the case by the Court of Appeals as are necessary in order to give jurisdiction to the Supreme Court of the United States on appeal under said section 25b.

This appeal is clearly prayed for and allowed under section 25b of the bankruptcy act.

Omitting caption, the petition for appeal is in words and figures as follows:

"PETITION FOR APPEAL TO THE SUPREME COURT.

"The above mentioned Daniel F. Blake, trustee as aforesaid, appellee in this court, respectfully shows that the amount in controversy herein exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States, in that the validity of a statute of and an authority exercised under the United States was drawn in question; and there was also drawn in question the validity of a statute of, and an authority exercised under, a state on the ground of repugnancy to the constitution, and laws of the United States; and a title, right, privilege and immunity was claimed under the constitution of, statute of, and a commission held, and authority exercised under, the United States and decided against.

"Wherefore the aforesaid appellee herein prays that an appeal be allowed him in the above entitled cause, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors filed herein may be reviewed.

"EDWIN A. KRAUTHOFF,
Attorney for Appellant (Appellee in this Court)."
(Record, pp. 16-17.)

Section 25b of the bankruptcy act of July 1, 1898, provides for appeals to the Supreme Court from any final decision of a court of appeals, allowing or rejecting a claim under this act, where the amount in controversy exceeds the sum of two thousand dollars, and the question involved was one which might have been taken from the highest court of a state to the Supreme Court of the United States, or where some Justice of the Supreme Court certificates that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

Section 709, U. S. Comp. Sta., 1901, provides for three classes of cases which may be taken from the highest court of a state to the Supreme Court of the United States on a writ of error.

The first class is where the validity of a treaty or statute of or an authority exercised under the United States is drawn in question and the decision is against their validity.

The second class is where there is drawn in question the validity of a statute of or authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of their validity.

The third class is where any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of or commission held or authority exercised under the United States and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority.

Mutual Life Ins. Co. v. *McGraw*, 188 U. S., 307;
Home Ins. Co. v. *Augusta*, 93 U. S., 121;
Scvier v. *Haskell*, 14 Wall. (U. S.), p. 15.

The appellant will not contend that this appeal comes within

either of the first or second classes. He, therefore, must rely upon the records showing that some right, title, privilege or immunity was *specially set up or claimed*, under the constitution or some treaty or statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity *specially set up or claimed* by either party under such constitution, treaty, statute, commission or authority.

No part of the record shows that any right, title, privilege or immunity or authority exercised under the constitution of the United States or under any treaty, statute or law of the United States, was specially set up or claimed by either party.

The appellees set up their claim to the property or the proceeds thereof in their intervening petition but not under any statute or law of the United States. If they had, the fact would be immaterial, since the decision was in favor of and not against the right which they asserted.

The appellant, so far as the record shows, did not answer the petition at all, but a hearing was had as if he had denied its averments. Such a denial is not equivalent to a special assertion of a right or title under the Statutes of the United States.

The decision of this Court in *Chapman* v. *Bowen*, 207 U. S., 89, is precisely applicable. There, Bowen, a creditor, filed a proof of claim, in which he asserted the right to participate ratably in the individual assets of a member of a partnership. The District Court disallowed his claim. The Circuit Court of Appeals allowed it, and reversed the judgment. The Trustee then appealed to this court under section 25 of the Bankruptcy Act. This court held that his denial of Bowen's claim did not amount to the special assertion of a right or immunity under a statute of the United States, and that the appeal must be dismissed.

Speaking by the Chief Justice, the Court said:

"The bankruptcy act provides, sec. 25, b:

'From any final decision of a court of appeals, allowing or

rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States in the following cases and not other:

"'1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

"'2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

"As to paragraph 2, there was not such certificate here; and as to paragraph 1, we are not able to perceive that a writ of error from the highest court of a state to this court could be maintained. No validity of a treaty or statute of, or an authority exercised under, the United States was drawn in question; nor the validity of a statute of, or an authority exercised under, any state, on the ground of repugnancy to the Constitution, treaties or laws of the United States; nor was any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and decided against.

"The decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act. And, moreover, even if it could be held that by his claim Bowen asserted any right within the meaning of section 709, Rev. Stat., the decision was in his favor, and the trustee's bare denial of the claim could not be relied on under that statute' *New Jersey City & Bergen Railroad Company* v. *Morgan*, 160 U. S., 288."

This appeal is governed by the decision in *Chapman* v. *Bowen*, *supra*. Not only did the Trustee fail to set up specially any right under the statutes of the United States, but it was not necessary for the court below to determine any such right, and the decision may be sustained "on well-settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act."

The decisive question was, Had the bankrupts defrauded the appellees, and was their title voidable at the date of the bank-

ruptcy? If it was, then the appellees may reclaim the property or its proceeds.

As was held in *Thomas* v. *Taggart*, 209 U. S., 385:

"If title to property is good as against the bankrupt or his creditors at the time the trustee's title accrues, title does not pass, and the owner of the property is entitled to have it restored to him, or, if it has been sold, the proceeds thereof."

We do not understand that the appellant disputes the correctness of that principle. We do not understand that he asserts that the bankruptcy act gives him a better title than the bankrupt to property fraudulently obtained. His contention is that the election to rescind was not seasonably exercised, and that the proceeds of the appellees' property were not identified. Such questions do not involve the determination of any right or title created by the Bankruptcy Act, but are merely questions of general jurisprudence which would be the same if no bankruptcy statute had ever been enacted.

In *McKenna* v. *Simpson*, 129 U. S., 506, it was held that when an assignee in bankruptcy resorts to a State court to set aside a conveyance by the bankrupt as made to defraud creditors, and no question is raised there as to his power under the Acts of Congress, or as to the rights vested in him as assignee, the judgment of the State Court is not reviewable under section 709 of the Revised Statutes. In the opinion of Mr. Justice Field, the earlier cases are collated, and are distinguished as involving the determination of rights dependent on the Bankruptcy Act.

In *Gableman* v. *Peoria Railway Co.*, 179 U. S., 335, 340, this decision was followed and approved.

In *Scott* v. *Kelly*, 22 Wallace, 57, it was held:

"When the question in a State court is not whether, if the bankrupt had title it would pass to his assignee under the bankruptcy act, but whether he had title at all and the State court decides that he had not, no question of which this court can take jurisdiction under section 709 of the Revised Statutes is presented."

There is nothing to the contrary in *Rector* v. *City Deposit Bank*, 200 U. S., 405, 411, and *Eau Claire Nat. Bank* v. *Jackman*, 204 U. S., 522, 532. There the trustee was the plaintiff, specially asserting a right dependent on a federal statute. The question was, had payments been received by the defendants, in violation of the statutory prohibition against preferences? The right was not only specially asserted, but it grew out of the statute and was measured thereby. "The right of the trustee in bankruptcy to recover thus depended upon a law of the United States" (200 U. S., at p. 412). So, in *Williams* v. *Beard*, 140 U. S., 529, 535, 536, the question was whether a property right was of such a nature as to pass to the trustee under the Bankruptcy Act, and the determination of that issue controlled the litigation.

The mere fact that a trustee is a party to a proceeding does not not in itself create a claim of right under a federal statute. If it did, *Chapman* v. *Bowen*, *McKenna* v. *Simpson*, *Gableman* v. *Peoria Railway Co.*, and *Scott* v. *Kelly*, *supra*, would have been differently decided. The right asserted must grow out of the statute, and depend upon it. No federal right in that sense was adjudicated in this proceeding.

II.

If we assume that the court has jurisdiction, the decree of the Circuit Court of Appeals should be affirmed on the ground that, although the record may show that this court has jurisdiction, it is manifest that the appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

In the case of *Life Ins. Co.*, v. *Brown*, 187 U. S., 311 (l. c.), it was said by Mr. Justice White:

"From the foregoing it results that a claim under the constitution and laws of the United States was made and decided in the

court below, and if the fact that such a claim was formally made and disposed of below without reference to its substantial foundation determines the question of jurisdiction, the motion to dismiss must be denied. But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantial question on which the case may be made to turn,' that is 'a real, and not a merely formal Federal question is essential to the jurisdiction of this court.'

"Stated in another form, the doctrine thus declared is, that although in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. (Citing *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S., 336, 46 Law Ed., 936, and authorities there cited.)

"It has also been decided by this court that even where the motion to dismiss is denied and where such motion should be treated as without color, considering alone the formal making of such, yet notwithstanding the provisions of subdivision and of rule 6, the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been presented for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contortion because it has previously been so specifically and adversely ruled on by this court as to absolutely foreclose further contention on the subject."

Citing Chanute v. *Trader*, 132 U. S., 210, 33 Law. Ed., 345;

Richardson v. *R. R. Co.*, 169 U. S., 128, 42 Law Ed., 687;

Blythe v. *Hinckley*, 180 U. S., 338, 54 Law Ed., 561.

The question whether or not the trustee in bankruptcy is entitled to property obtained by the bankrupt through fraud, as against the party sought to be defrauded, which was the question involved in this case and which is the only question raised by appellant's assignment of errors to be urged as ground for reversal,

has been fully decided in favor of the party sought to be defrauded, innumerable times, and there is no room for real controversy.

Thomas v. *Taggart*, 209 U. S., 385, 389, 390;
Turner v. *Ward*, 154 U. S., 618, 23 Law Ed., 391;
In Re Patterson & Co., 125 Fed., 562;
In Re Weil, 111 Fed., 897;
In Re Hamilton Furn. Co., 117 Fed., 774;
Hewitt v. *Berlin Machine Works*, 194 U. S., 300;
York Mfg. Co. v. *Cassell*, 201 U. S., 344.

The distribution of the estate should not be delayed while the trustee in bankruptcy litigates a question so obviously devoid of merit.

III.

The motion should be granted.

Respectfully submitted,

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FILED.
MAY 3 1909
JAMES H. McKENNEY,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

DANIEL F. BLAKE, AS TRUSTEE IN BANKRUPTCY OF WALKERN-LEWIS MILLINERY COMPANY,
Appellant,

vs.

WILLIAM OPENHYM & SONS,
Appellees.

No. [redacted]71.

Suggestions in Opposition to Appellees' Motion to Dismiss or Affirm.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

DANIEL F. BLAKE, AS TRUSTEE IN BANKRUPTCY OF WALKEEN-LEWIS MILLINERY COMPANY,
Appellant,

vs.

WILLIAM OPENHYM & SONS,
Appellees.

No. 269.

Suggestions in Opposition to Appellees' Motion to Dismiss or Affirm.

STATEMENT OF THE CASE.

In the case at bar the appellees have filed a motion (in the alternative) to dismiss or affirm. The ground of the motion to affirm is thus stated:

"It is manifest that said appeal was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument."

The facts with reference to this case, briefly stated, are as follows:

The Walkeen-Lewis Millinery Company, bankrupt, a corporation, was doing business in Kansas City, Missouri, and the appellees, William Openhym & Sons, sold and shipped to the bankrupt

during the latter part of July, 1905, certain bills of goods amounting in the aggregate to $3,125.74.

On the 12th day of August, 1905, a suit was filed in the Circuit Court of Jackson County, Missouri, by a creditor of the Walkeen-Lewis Millinery Company, and a receiver was appointed for said company in said court on the ground of the alleged insolvency of the Walkeen-Lewis Millinery Company.

On the 15th day of August, 1905, other creditors of the Walkeen-Lewis Millinery Company filed an involuntary petition in bankruptcy against said Company, and on the 23rd day of September, 1905, said Company was declared bankrupt and Daniel F. Blake was appointed receiver in bankruptcy and ordered to take charge of the assets of the estate.

On the 21st day of August, 1905 (six days after the petition in bankruptcy had been filed and with knowledge of the filing thereof), the appellees, by leave of the state court, and without any leave of the bankruptcy court instituted in the Circuit Court of Jackson County, Missouri, an action in replevin against the company and the receiver appointed by the state court to recover the goods claimed to have been sold by them to said company, on the alleged ground that the sale was induced by fraudulent representations of the vendees as to its financial condition. Under the writ of replevin the sheriff of Jackson County, Missouri, took possession of the goods identified in the hands of the receiver as part of the stock so sold, estimated to be of the value of $2,582.80. Upon the execution of a re-delivery bond, all of said goods, so replevied, were returned to the receiver of the state court who mingled them with other goods of the estate and who was continuing the business of the Walkeen-Lewis Millinery Company.

Subsequently the replevin suit instituted by the appellees herein in the state court was enjoined by the United States District Court and the restraining order was made perpetual on December 1, 1905, and no appeal was taken from said final order.

On October 2, 1905, the receiver in bankruptcy sold all of the property of the bankrupt Millinery Company, and on December 10, 1905, a dividend upon the claims allowed against the estate of the bankrupt Millinery Company was declared, and on December 21, 1905, Openhym & Sons presented their intervening petition to the Referee in Bankruptcy for the allowance of their claim for $2,582.80 *as a preferred one.*

On March 24, 1906, the referee in bankruptcy found that the intervenors were entitled to the preferential allowance as prayed for. The trustee appealed from the decision of the referee and the District Court reversed the action of the referee. From the judgment of the District Court, Openhym & Sons, the appellees herein, prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit and on November 9, 1907, the Circuit Court of Appeals made an order reversing the decree of the District Court and the cause was remanded with directions to allow the claim of appellees herein as prayed. From this order and judgment, the trustee in bankruptcy filed his petition for appeal to the Supreme Court of the United States, which was allowed on December 9, 1907.

ARGUMENT.

It is contended by the appellees herein that this appeal should be dismissed for the reason that "it is manifest that said appeal was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument."

By referring to the findings of fact in this case it will be found that the petition in bankruptcy was filed on the 15th day of August, 1905, *and that after the filing of the petition in bankruptcy* and on August 21, 1905, the appellees herein, *in total disregard of the bankruptcy proceeding*, instituted a suit in replevin in the Circuit Court of Jackson County, Missouri, to recover certain goods, which it was claimed were sold to the Walkeen-Lewis Millinery Company under false and fraudulent representations made with reference to the financial condition of said company. While this replevin suit was pending and before any steps had been taken in the bankruptcy proceeding by the appellees herein, all of the goods belonging to the bankrupt estate, including the property claimed by appellees in the replevin action, were sold by the receiver in bankruptcy, and thereafter, on the first day of December, 1905, the appellees herein were permanently restrained from further prosecuting the replevin action instituted in the Circuit Court of Jackson County, Missouri.

The appellees herein took no action in the bankruptcy proceeding until December 21, 1905, when the intervening petition was filed, which was five months after the petition in bankruptcy had been filed, and four months after an adjudication in bankruptcy had been entered, and almost sixty days after all of the property belonging to the bankrupt, including the property claimed in the intervening petition, had been sold by the receiver in bankruptcy. So that the question in the case at bar is not a frivolous question,

but one of the very greatest importance, for if a creditor, claiming goods in the hands of a trustee in bankruptcy, can wait until after all of the property has been sold by the bankruptcy court, and after the property which he claims has been mingled with the other assets of the bankrupt, can then go in and recover the full invoice price of said goods, out of the funds realized by the trustee in bankruptcy from the sale of the entire assets, then the very object of the bankruptcy act is at an end, as it has been held that the object of the bankruptcy act is, so far as creditors are concerned, to secure equality of distribution, among all, of the property of the bankrupt. *Pirie* v. *Chicago, Title & Trust Co.*, 182 U. S., 438.

In the case at bar, the appellant, the trustee in bankruptcy, claims the right to the property in question as an asset of the bankrupt estate under the bankruptcy law of the United States.

The case of *Rector* v. *City Deposit Bank*, 200 U. S., 405, 411, was a case in which the trustee in bankruptcy instituted an action in the State Court to recover the possession of certain property which he claimed was property belonging to the bankrupt estate. The State Court instructed the jury to find for the defendants and this judgment was affirmed by the Supreme Court of the state. The case was taken to the Supreme Court of the United States on a writ of error and it was contended that the Supreme Court of the United States had no jurisdiction of the cause. In the course of the opinion, Justice White said:

"Both these contentions might well be disposed of by saying that the action was brought by a trustee appointed under the bankrupt law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. This, therefore, presented a federal question, and the denial of the asserted right was the denial of a right or title specifically claimed under a law of the United States."

In the case of *Eau Claire National Bank* v. *Jackman*, 204 U. S., 522, 531, 532, a case very similar to the case at bar, Justice McKenna, in the course of the opinion, said:

"A motion is made to dismiss on the ground that the record presents nothing but questions of fact. It is contended that neither in the pleadings of the bank nor in any way was any right, privilege or immunity under a federal statute specifically set up or claimed in the state courts. The only questions presented by the pleadings, it is urged, were, did the bankrupt give the bank a preference, and did the bank accept it with reasonable grounds to believe that a preference was intended? The Supreme Court, however, considered the pleadings to have broader meaning, and answered some of the contentions of the bank by the construction it gave to the bankrupt act. The case, therefore, comes within the ruling in *Nutt* v. *Knut*, 200 U. S., 12. It was there said: 'A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States, may be fairly held within the meaning of Sec. 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary."

Under the bankruptcy law of 1867 this court assumed jurisdiction *inter alia* of the following cases on writs of error to state courts:

Forsythe v. *Vehmeyer*, 177 U. S., 177;
Sharpe v. *Doyle*, 102 U. S., 686;
Factors etc. Co. v. *Murphy*, 111 U. S., 738, 741;
Mays v. *Fritton*, 131 U. S., C. XIV;
Dushane v. *Beall*, 161 U. S., 513, 518;
Williams v. *Heard*, 140 U. S., 529;
Traer v. *Clews*, 115 U. S., 528, 533, 534;
New Orleans etc. R. R. Co. v. *Delamore*, 114 U. S., 501, 506;
Palmer v. *Hussey*, 119 U. S., 96;
Hennequin v. *Clews*, 111 U. S., 676.

Under the bankruptcy law of 1898, this court has assumed jurisdiction in the following cases, coming to this court under the provision of Sec. 25b, from the Circuit Court of Appeals:

Pirie v. *Chicago Title & Trust Co.*, 182 U. S., 438;
Pickens v. *Roy*, 187 U. S., 177;

Page v. *Edmunds*, 187 U. S., 596;
Jaquith v. *Alden*, 189 U. S., 78;
New York Co. Nat. Bank v. *Massey*, 192 U. S., 138;
Hewit v. *Berlin Mach. Wks.*, 194 U. S., 296;
Western Tie & Timber Co. v. *Brown*, 196 U. S., 502;
Whitney v. *Dresser*, 200 U. S., 532;
York Mfg. Co. v. *Cassell*, 201 U. S., 344;
Conboy v. *First Natl. Bank*, 203 U. S., 141;
New Jersey v. *Anderson*, 203 U. S., 483;
Hiscock v. *Varick Bank*, 206 U. S., 28;
Gazley v. *Williams*, 210 U. S., 41.

Under the bankruptcy law of 1898, the following cases have been reviewed by this court on writ of error to a state court:

Dunbar v. *Dunbar*, 190 U. S., 340;
Kean v. *Calumet Canal*, 190 U. S., 452;
Tinker v. *Colwell*, 193 U. S., 473;
Crawford v. *Burke*, 195 U. S., 176;
Kaufman v. *Tredway*, 195 U. S., 271;
Birkett v. *Columbia Bank*, 195 U. S., 345;
Cramer v. *Wilson*, 195 U. S., 408;
Bullis v. *O'Beirne*, 195 U. S., 606;
Wetmore v. *Markoe*, 196 U. S., 68;
First Natl. Bank v. *Lasater*, 196 U. S., 115;
Thompson v. *Fairbanks*, 198 U. S., 516;
Humphrey v. *Tatman*, 198 U. S., 91;
Hammond v. *Whitredge*, 204 U. S., 538.

It will also be noted by the court that although the transcript on the pending appeal was filed in this court on February 8, 1908, no motion to dismiss or affirm was interposed until May 3, 1909, nearly fifteen months thereafter. The case has now reached the point on the docket where it will be set for argument on the merits early in October, 1909.

For the information of the court we print *infra* the opinion

of the district court (Phillips, J.), and we also submit the brief that was filed on the merits in the United States Circuit Court of Appeals for the eighth circuit. An inspection of these will show that the question arises on the merits; instead of being frivolous, on the other hand, is exceedingly difficult of solution.

"In the District Court of the United States for the Western Division of the Western District of Missouri.

"In the Matter of Walkeen-Lewis Millinery Co., Bankrupt.
William Openheym & Sons, Complainants.
"In Bankruptcy.

"Memorandum opinion by Philips, D. J.

"This controversy grows out of the petition of the firm of William Openheym & Sons, of the city of New York, predicated of the claim that certain bills of goods, sold and shipped by them between the middle and latter part of July, 1905, to the Walkeen-Lewis Millinery Company (a corporation) of Kansas City, Missouri, were induced by fraudulent representations of the vendees as to its financial condition.

"On the 12th day of August, 1905, at the suit of a creditor, the state circuit court of Jackson county, Missouri, appointed a receiver for the Walkeen-Lewis Millinery Company on the ground of its alleged insolvency. On the 15th day of August, 1905, other creditors of the insolvent, filed in this court a petition in involuntary bankruptcy against said company, charging insolvency, and that it had committed an act of bankruptcy by reason of the appointment of said receiver by the state court; and the company was accordingly adjudged bankrupt on the 23rd day of September, 1905, and Daniel F. Blake was then appointed receiver in bankruptcy, and ordered to take charge of the assets of the estate. Whereupon the receiver of the state court turned over the property in his hands to said Blake, who was duly elected and qualified as trustee on the day of October, 1905.

"The claimants, William Openhym & Sons, although they had actual notice of the institution of the proceedings in involuntary bankruptcy, on the 21st day of August, 1905, by leave of the state court, instituted in said Jackson county circuit court an action of replevin against said company and the receiver under the state court for recovery of the goods claimed to have been sold by them to said company. Under the writ of replevin the sheriff took possession of the goods identified in the hands of the receiver as part of the stock so sold as aforesaid, estimated to be of the value of $2,582.80 (but not finding other of said goods on hand estimated to be of the value of $542.92). On the exe-

cution of a re-delivery bond said goods so replevined were returned to the state court receiver, who mingled them with other goods of the estate, and proceeded to sell out of the common stock in the usual course of business, for cash and on credit, paying out of the proceeds the expenses of conducting said business.

"The claimants will persisting in prosecuting the replevin suit in the state court, the trustee in bankruptcy presented a petition to this court, asking for an injunction against said claimants and their attorney of record, Mr. I. J. Ringolsky, which was granted, and the said Openhym and Sons and said Ringolsky were temporarily restrained from the further prosecution of said replevin suit; and this restraining order was made perpetual on December 1, 1905.

"As evidence of the total disregard of the proceedings in bankruptcy and the jurisdiction of this court over the estate of the bankrupt, the claimants on the 3rd day of November, 1905, presented motion to this court to dismiss the whole proceeding in bankruptcy as to them, on the ground that by the action of replevin instituted by claimants they had acquired an exclusive right to the property therein replevined.

"Not until December 21, 1905, did the claimants present to the referee in bankruptcy what is designated as an intervening petition, laying claim, as a preferred creditor, to the sum of $2,582.80 as the value of the goods replevined, and to have allowed as a general creditor the sum of $542.94, the alleged value of the goods not found by the sheriff. On the hearing the referee allowed these claims as prayed for. On exceptions thereto by the trustee in bankruptcy the cause was certified to this court for review.

"It is apparent from a reading of the whole record in this case that quite a free hand was allowed to the claimant on the hearing before the referee, who introduced in evidence everything known or heard of by them or their counsel, except facts sufficient to constitute a cause of action. The findings made by the referee are not fully sustained by the proofs, and they omit some important facts.

"To entitle the vendor to rescind a sale of goods and reclaim the same, or the proceeds thereof, the law imposes upon him some imperative obligations. As applied to this instance, in the first place he must show that the goods were obtained upon fradulent representations by the vendee as to his financial condition, and that the vendor in parting with the goods did so upon the faith of the truth of the matters so represented. In the second place, he must immediately upon discovering the fraud give notice of his purpose to rescind and reclaim the goods, and he must follow up this notice promptly with a demand for the goods

before the rights of third parties become involved. Such notice and demand to be effective must be given to and made upon him who is in position to comply therewith. The situation of this case furnished an apt illustration of the evils resulting from so-called reclamation proceedings animadverted upon by Mr. Collier in his 5th edition on bankruptcy, p. 562, in which he says:

" 'In effect, estates are often dissipated by greedy and not over-scrupulous creditors, who apply for possession, after recession, on the ground of alleged fraudulent representations, and are granted what they ask, without adequate judicial investigation of their right to it and before there is a court officer authorized to bond back the goods reclaimed. * * * Reclamation proceedings are, however, so new a device of the preferentially inclined that there are few reported precedents. Most of the evils resulting will, however, be avoided if the claiming creditor is at least required in the first instance, always after a short notice to the receiver or creditors, to prove identity strictly either before the judge or a referee sitting as special master. The delay incident to such proof will check at the outset a practice which, under the state systems, has fostered perjury and made ' "diligence" a word at which lawyer and layman are wont to blush.' * * * The court whose right to possession is questioned can, it is thought, may, in the interests of that prorating which the bankruptcy law commands, should insist on the claimant establishing identity by proof in open court, with right to cross-examination by the adverse party, before yielding that which in bankruptcy cases is often more than 'nine points of the law.' "

"The evidence in this case shows that from the time the bankrupt began business in the fall of 1902 the claimants had sold them all the goods they wanted. Statements had hitherto, at least one in January, 1905, been made by the bankrupt of its financial condition. Up to July, 1905, they had paid this creditor for all past due purchases. The only matter up to the hour of this controversy complained of by Openhym & Sons is the statement made on this hearing by their credit-man that this customer was a little slow at times in making payments, and therefore he asked for a statement of the financial condition, which was made, one July 5th and the other July 13th. No letter, however, was produced on the hearing evidencing such request. As evidence that this statement was not gotten up especially to influence the action of this claimant in selling its goods, is the fact testified to by Mr. Lewis, one of the directors of the insolvent concern, that he sent the statement in question to other merchants with whom the concern traded, (who although they sold to the bankrupt over $30,000 of goods after July 1st, 1905, made no claim of reclam-

ation). When the matter of misrepresentation is reduced to its practical essence it resolves itself into about this: there were owing to the directors of the company, who were its stockholders, separate sums aggregating about $14,000, and perhaps $2,500 for wages to two of the firm, and some other minor matters. There is little basis for saying that the statement of assets and liabilities furnished by the company in said reports was not otherwise reasonably fair and honest. The reason assigned for not including the individual liabilities to the members of said company, as shown by the testimony of Mr. Lewis, was that they did not purpose to have these paid out of the assets of the concern, but intended to put them in as increased stock contributed by them. In explaining this Mr. Lewis testified as follows:

"'I called Mr. Walkeen's attention to the fact that I had not included the moneys owing to the members of the corporation and that I wouldn't include the $5,000 worth of accounts that we had arranged to be paid when our fall season began, but I was making a statement of the demands that were made on us then, a truthful statement he could present to the New York firms of what we had to pay with then and what we had to pay for * * *. The past due accounts had been arranged for; they had been extended.'

"After stating that these matters were part of the gross indebtedness, he said:

"'It was a truthful statement of what it purported to be. * * * What was put in the statement was directly at the request of Mr. Walkeen to put him in a position to tell the people just exactly what we had at the beginning of the season. There was no intention to misuse the money that had been advanced by the members of the corporation, but it was our intention at a subsequent time to increase the capital, it was to be taken in stock and when we could we were to pay ourselves. * * * The purpose was to tell the creditors exactly the condition of the business at that time, as could possibly interest them, and to leave it to them to judge whether they would sell us goods.'

"Further on he said they did not anticipate any litigation or expect any interruption of the business; that he had no reason to believe that the statement was not correct; that the accounts receivable put in the statement amounted to nine or ten thousand dollars less than the books showed; that the bills receivable $1,820.50 was just what the books showed; and that the cash represented on hand in the bank, $1,568.01, was correct.

"Insofar as any creditor was concerned who sold upon the faith of the statement made, the claim of the said directors, members of the firm against it in no degree increased the

hazard of the credit extended, as they could not be admitted to a participation in the assets *pari passu.*

"Mr. Justice Brewer, in *South Branch Lumber Company* v. *Ott,* 142 U. S., 622-631-632, commenting upon the question of debt being voluntarily contracted based upon representations of the holdings of the purchaser, where it was alleged that the party, had put among his assets a quarry valued at $14,000, said:

"'He named this quarry as a part of his assets, and gave his estimate of its value. If the lumber company desired further information as to its location, its condition and its prospects, it could have asked of him, or made itself an independent investigation. If it was content with his statement, it must show not merely that he had overestimated but further that he had fraudulently given the value. He furnished to the lumber company the data for investigation, and while *caveat emptor* is the rule as to the thing sold, *caveat venditor* is also the rule as to the pecuniary condition and solvency of the purchaser. Something more than overestimate of value on the purchaser's part is necessary before it can be said that on this account the debt was fraudulently contracted. A deliberate overestimate and an intention to defraud are essential.'

"It is quite apparent that this creditor, in making up its mind to reclaim the goods, was in possession of no other fact than that a receiver had been appointed in the state court for the company on the ground of its alleged insolvency, for it telegraphed to its counsel as soon as it learned thereof to claim the goods as having been fraudulently obtained. It had made no inquiry into the truth of the statements made to it by the purchaser.

"But waiving all this, and conceding the right to rescind the sale, if promptly acted upon, how stands this case? It is conceded that on the 12th day of August, 1905, a receiver was appointed by the state court of the bankrupt's estate on the alleged grounds of insolvency. This was an act of bankruptcy which entitled the creditors to have the insolvent declared a bankrupt under the nation bankruptcy act. (Chap. 3, Sec. 3, subsec. 4, as amended). Accordingly, on the 15th day of August, 1905, a petition in due form was filed in involuntary bankruptcy by creditors to have the insolvent company declared bankrupt. The legal effect of this was a *caveat*—a warning *in rem*—to all the world that the estate of said insolvent had passed under the jurisdiction of the bankrupt court, and so *instanti* it operated as an attachment of the property of the bankrupt or as an injunction against all other creditors and persons, to not thereafter interfere with the estate. In contemplation of law, the estate was thenceforth *in custodia legis. In re Granite City Bank,* 137 Fed., loc. cit. 818. C. C. A.

"Without discussing what was the immediate effect of the petition in bankruptcy on the pending suit in the state court, and conceding that it in nowise affected any existing superior right of the claimants to the goods in question, it is sufficient for the purposes of this case to say that its effect was to notify all creditors of the insolvent estate that so far as they were concerned the property—the estate of the debtor was subject to the jurisdiction of this court. No creditor or claimant of the estate could thereafter meddle with the property or assert any right to or lien thereon except through and by a proceeding in this court. This claimant, through its counsel, admitted in argument on this review that on the day following the filing of the petition it had actual knowledge of the proceeding in bankruptcy. Yet, in utter disregard of the exclusive control and jurisdiction of the court of bankruptcy, it undertook, by action of replevin, to seize and appropriate the goods of the bankrupt estate under claim of right thereto. That claim was and is based upon a contract of sale, which is claimed to have been obtained through fraudulent representations as to the purchaser's financial condition. Such a sale is not void, but only voidable, and until rescinded the property remains that of the purchaser. It is perfectly evident from the motion made in this court by the claimant to have the temporary injunction dissolved and from its petition presented to the referee in bankruptcy, that they predicate their preferential right upon the reclamation proceedings in replevin in the state court; and throughout the referee in bankruptcy in his opinion attaches much importance thereto. Whereas the law is that the claimant obtained no right or advantage by such proceeding. No demand was at any time made by this claimant upon anyone who had, as against the creditors represented by the bankrupt court, a right to surrender the goods. The bankrupt court alone had jurisdiction to afford relief, if any, to the claimant as a preferential creditor, either to the goods in kind or their proceeds. (*In re Whitener*, 105 Fed. 180. C. C. A. ; *Fisher* v. *Cushman*, 103 Fed. 867, C. C. A. ; *In re Weinger, Bergman & Co.*, 126 Fed. 875; Loveland on Bankruptcy, Par). It was, therefore, within the competency of the bankrupt court to enjoin the replevin suit and set it at naught. The injunction could have even run against the state circuit court itself to stay its action therein. (*White* v. *Schloerb*, 178 U. S., 147). By intervention in the bankruptcy proceeding the claimant could have asserted its preferential right to the goods and had them segregated and the *statu quo* maintained until the rights of all the parties in interest could have been established by the court. Instead of this proper course, the claimant went around the bankruptcy court, and in the meantime suf-

fered the receiver of the state court to destroy the identity of the goods claimed by mingling them with other goods of the estate and selling them, so that, as admitted in argument by counsel for claimant, it became impossible not only to identify the goods claimed or to point out into what asset of the estate turned over to the receiver in bankruptcy it passed, if it so passed at all.

"For some reason unknown to the law, counsel before the referee was permitted to put in evidence, over the trustee's objection, an order drawn up by claimant's counsel in the form of an order he wished the court to make on the return day of the hearing of the temporary restraining order, which was o. k.'d by counsel representing the receiver. As that was purely a matter *in pais* between counsel, it was not binding on or recognized by the court. The court made its own order, making the injunction perpetual, and by that order it alone speaks. As counsel for claimant acquiesced therein, it precludes any recourse to the antecedent doings of counsel respecting this matter.

"With or without the entry of appearance of the claimants to the injunction suit, they were bound by the temporary injunction, as their counsel had notice thereof. (*In re Charles W. Nesbet*, recently decided by this court, not yet published). The order made in the injunction stating that it was without prejudice to the right of the claimants to present their claim to the referee in such form as they might choose with the right of the trustee to defend the same, neither enlarged nor restricted any right the claimants or the trustee had in respect of the validity of the claim.

"For reasons unknown to the law the referee allowed counsel to inquire of the trustee in bankruptcy if he did not, when appointed receiver, have notice of the existence of the replevin suit. Suppose he did, would the fact bind the court or affect its right to stop the replevin suit and disregard anything done in the state court? Could any personal knowledge had *in pais* by the receiver be imputed to the court by way of estoppel, or create any equity in favor of a creditor who was acting in disregard of the bankrupt law? Without appealing to the bankrupt court, allowing it through its receiver an opportunity to be present at any inquest held to identify the goods claimed, the claimants held the inquest with the sheriff as sequestor, and persisted in going ahead in the state court until compelled to desist by injunction. Thus were the goods left in the hands of the state receiver until confused with the mass of other goods contributed by other merchants (as the evidence shows that other merchants, after the first of July, 1905, had sold to the debtor company about $30,000 worth of goods) and for more than a month, when this court ordered its receiver to take charge, the state receiver proceeded to conduct the business and

sell goods. How much he sold is not known. But he was paying all this time, out of the sales, the expenses of running the business and of traveling salesmen. All the money turned over to the receiver in bankruptcy was $207. The invoice price of the goods was $38,384, and the accounts turned over on their face amounted to $74,391.92. Moreover, claimants stood by while the goods and accounts turned over to the receiver in bankruptcy were sold by him under order of this court, realizing only $38,000 on the whole. And not until December 21, 1905, after a dividend of ten per cent, had been declared upon the debts proved, did the claimants present this claim for the action of the bankrupt court, demanding that they recover the full value on the goods sold by them that were replevined.

"And as evidence of the importance both counsel for the claimants and the referee in his findings attach to the effect of the replevin suit, the referee allowed as preferential the claim of $2,582.80, the value of the goods claimed to have been identified by the traveling salesman of the claimants, and the sum of $542.94 as a general creditor for the balance of the goods sold to the debtor. Upon the theory on which the preferential claim was allowed, the whole claim should have been thus allowed. This for the reason that the only ground for allowance of the preferential claim justified by the evidence is that the proceeds of the sale of any of the goods went into the mass of the bankrupt estate, and that the claimants entitled to take therefrom the amount of their claim as having contributed to swell the amount of the assets that passed to the receiver.

"The receiver in bankruptcy is only answerable for the funds of the estate coming to his hands. To impress this fund in his hands with an equitable lien in favor of this creditor, the burden rested upon them to show one of two things: (1) either that the receiver or the trustee in bankruptcy had received in kind the goods of the estate which in equity belonged to this claimant; or (2) that the goods belonging in equity to them had been mingled by the bankrupt with goods of the estate which had passed over in mass to the receiver or trustee in bankruptcy, or which had been sold and the proceeds thereof traced directly into the hands of the receiver or the trustee in bankruptcy. The law of the case in this jurisdiction is thus expressed by the court of appeals in *John Deere Plow Company* v. *McDavid*, 137 Fed., 811-812,———— C. C. A.————:

"'A careful examination of this record and the adjudicated cases leads us to the conclusion that the plow company is not entitled to a priority over other creditors to funds in the hads of the trustee to the amount of $1,442.25, for the reason that it does not

appear that any of the money received from the sale of goods made under the contract actually passed into the hands of, or are held by, the trustee. The owner of a fund which has been misappropriated by one who held it in trust cannot follow it in the hands of the trustee unless he can trace the trust fund in kind or in specific property into which it has been converted, or, if the fund has been mingled with the trustee's other property, to establish a charge on the mass of such property for the amount of this fund. In other words, he can secure a preference out of the proceeds of the estate of the insolvent only where he can trace the trust property or fund, in its original or some substituted form, in the estate which comes into the hands of the trustee.'

"The court quoted with approval the following language from *Spokane Company* v. *First National Bank*, 68 Fed. 979, 16 C. C. A. 81:

"'We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business the general creditors of the estate are by that amount benefited, and that therefore, equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. * * * Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant.'

"The supreme court of Massachusetts, in *Little* v. *Chadwick*, 151 Mass. 109, 7 L. R. A. 570, speaking through Mr. Justice Allen, said:

"'When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains. He may have lost it with property of his own, and in such case the *cestui que trust* can only come in and share with the general creditors.'

"A very interesting and instructive discussion of this question is found in *Slater* v. *Oriental Mills*, 18 R. I. 352, in which the court refused to hold that where one's property has been wrongfully applied a charge remains upon the general estate of the latter for the amount thus wrongfully taken, upon the ground that

his estate is thereby increased, and that the trust property is really there in a substituted form, although it cannot be directly traced. The court then proceeded to say:

"'While one who has been wronged may follow and take his own property or its visible product, it is quite a different thing to say that he may take the property of somebody else. The general property of an insolvent debtor belongs to his creditors, as much as particular trust property belongs to a *cestui que trust.* Creditors have no right to share in that which is shown not to belong to the debtor, and, conversely a claimant has no right to take from creditors that which he cannot show to be equitably his own. But right here comes the argument that it is equitably his own, because the debtor has taken the claimant's money and mingled it with his estate, whereby it is swelled just so much. But as applicable to all cases, the argument is not sound. Where the property or its substantial equivalent, remains, we concede its force; but where it is dissipated and gone, the appropriation of some other property in its stead simply takes from creditors that which clearly belongs to them. In the former case, as in *Pennell* v. *Deffell,* 4 De Gex. M. & G., 372, and *in re Hallett's Estate* (*Knatchbull* v. *Hallett*), 13 Ch. Div., 696, the illustration may be used of a debtor mingling trust funds with his own, in a chest or bag. Though the particular money cannot be identified, the amount is swelled just so much, and the amount added belongs to the *cestui que trust.* But in the later case there is no swelling of the estate, for the money is spent and gone, or as respondent's counsel pertinently suggests, 'Knight Bruce's chest, Jessel's bag, is empty?' Shall we therefore order a like amount to be taken out of some other chest or bag or out of the debtor's general estate? Suppose the general estate consists only of mills and machinery, acquired long before the complainant's money was appropriated; upon what principle could that property be taken to reimburse them? But the complainants say: "Our money has been misappropriated by the debtor without our consent and without our fault. Why should we not be reimbursed out of his estate?" Undoubtedly, it is right that everyone should have his own, but when a claimant's property cannot be found, this same principle prevents the taking of property which equitably belongs to the creditors of the trustee to make it up. The creditors have no wrongful act, and should not be called upon, in any way, to atone for the misconduct of their debtor. It is an ordinary case of misfortune on the part of claimants whose confidence in a trustee or agent has been abused.'

"If the law were otherwise it would result that although every dollar's worth of the goods furnished by this creditor had

been sold by the state receiver and the proceeds thereof paid out by him in expenses incurred in conducting the business, or if the proceeds were represented by any of the various accounts which were worthless, this creditor could nevertheless take out of the proceeds of the goods received by the trustee in bankruptcy the entire original value of the goods sold by them, notwithstanding every dollar's worth of the remaining goods were furnished by other merchant creditors whose claims are unpaid. Neither the bankrupt law nor the rule of equity tolerate such injustice to such general creditors.

"While there may be found in the loose language of a witness a general expression to the effect that the goods attempted to be replevined passed over to the receiver in bankruptcy, the evidence in its entirety clearly shows that nothing more was known of that particular segment of goods than that the state receiver mingled them beyond identification with a large mass of goods, and that he went on selling from the mass, with no possibility of tracing either the goods or their proceeds into the hands of the receiver in bankruptcy; and so counsel for claimants in his argument before this court was candid enough to concede.

"While the *cestui que trust* whose dollar has been wrongfully put into a bag with one hundred dollars of the trustee, has the right to put his hand in the bag and take out any one dollar of the mass, he must first show by satisfactory evidence that his dollar went into the bag. This the evidence in this case fails to do.

"The referee went so far in his findings as to direct the trustee in bankruptcy to pay out of the funds of the estate the costs incurred by the claimants in said replevin action, 'as per stipulation in that behalf contained in the form of order between counsel.' This evidently has reference to a form of order drawn up by claimants' counsel, o. k.'d by the trustee's counsel. As this order was not approved by the court, and the costs incurred in the replevin suit created no claim against the estate in bankruptcy, this allowance by the referee is manifestly improper.

"There is another fact entirely overlooked in this case. It appears from the deposition of the witness Arthur Ronald, taken on behalf of the claimant, that the account of these goods had been credited with an item of $13.32, leaving the net account $3,112.42. In the intervening petition the claimants claimed the whole account amounting to $3,125.74, making no mention of this credit, and not even offering to account therefor.

"If this were an action at law for the recovery of the goods sold, the party claimant would have had to offer to return the amount received by it, and in equity he should have admitted this credit, and thus, while asking equity, have shown a disposition to

do equity. Independent of this however, the exceptions to the action of the referee, in allowing the claim of $2,582.80 as a preferred claim must be sustained, and the finding in this respect is disapproved."

An examination of the opinion in the circuit court of appeals (157 Fed. 536), shows that the result reached in that case depended upon the force and effect given to the action in replevin, which, as hereinbefore shown, was instituted after the petition in bankruptcy was instituted; in other words, the question in the case was as to the force and effect of a proceeding in bankruptcy followed by a subsequent petition in replevin. This clearly presents a federal question.

The authority relied on by the appellees in their motion to dismiss has no bearing on the question presented in the case at bar.

It is worthy of note that since the bankruptcy law was enacted in the year 1898.*Chapman* v. *Bowen,* 207 U. S., 89, is the only case in which this court has declined to assume jurisdiction on an appeal or a writ of error arising under the bankruptcy law. The only question arising in that case was as to the allowance of a claim. Of that question, this court said:

"The decision below proceeded on well settled principles of general law, broad enough to sustain it without reference to the provisions of the bankruptcy act."

It was further pointed out in the case cited (207 U. S., 92), that it was Bowen, the creditor, who claimed a right under the laws of the United States (if any was claimed in that case), and that the claim of Bowen was in fact sustained; in other words, the person claiming the right was not denied the right, but the right was accorded to the person claiming it, and it was further ruled that the person denying the assertion of a federal right cannot on appeal to the supreme court of the United States claim that a federal question was involved, because a right under the federal law was asserted and the right granted against the protest of the ap-

pealing party, who denied the right which was claimed under the federal law.

In *Acme Harvester Company* v. *Beekman Lumber Co.*, No. 714, pending in this court, a motion to dismiss or affirm was denied by the court.

On the whole case, the motion to dismiss and to affirm should be overruled, and the case should be retained on the docket for oral argument, and then the judgment below should be reversed and the cause remanded with directions to reinstate the judgment entered by the district court.

Respectfully submitted,

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Of Counsel.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

WILLIAM OPENHYM & SONS,
Appellants.

vs.

DANIEL F. BLAKE, TRUSTEE IN BANKRUPTCY IN THE MATTER OF WALKEEN-LEWIS MILLINERY COMPANY, BANKRUPT,
Appellee.

No. 2467.

STATEMENT AND BRIEF OF APPELLEE.

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Appellee.

No. 2467.

STATEMENT AND BRIEF OF APPELLEE.

STATEMENT OF FACTS.

UNDISPUTED FACTS:

1. Walkeen-Lewis Millinery Company was a corporation organized September 30, 1902, and engaged in the wholesale millinery business at Kansas City, Missouri, until August 12, 1905 (Rec., p. 48.)

2. On the 12th day of August, 1905, at the suit of New England National Bank, one of its creditors, and because of its insolvency, Thad B. Landon was appointed receiver and put in charge of the property of said company by the Circuit Court of Jackson County, Missouri (Rec., pp. 3, 139; Appellant's Brief p. 5).

3. On the 15th day of August, 1905, three creditors of said

millinery company filed a petition in involuntary bankruptcy against it, charging insolvency and alleging, as acts of bankruptcy, that on August 12, 1905, said company consented to the appointment of a receiver for it by the Circuit Court of Jackson County, Missouri, and because of its insolvency a receiver was on that day appointed by said court for it and put in charge of its property under the laws of the state of Missouri, (Rec., pp. 2, 3).

4. Within a day or two after the petition in bankruptcy was filed and before the appellants filed their replevin suit in the state court, they had actual notice and knowledge of the pendency of the bankruptcy proceedings (Rec., pp. 42, 139 Appellant's Brief, p. 39).

5. On the 21st day of August, 1905, the appellants, by leave of the state court, instituted a replevin action in the Circuit Court of Jackson County, Missouri, against the millinery company and Mr. Landon, the receiver, for the recovery of certain goods claimed theretofore to have been sold by them to said company. Under the writ of replevin the sheriff took posession of the goods identified in the hands of the receiver as a part of the stock so sold, as aforesaid, estimated to be of the value of $2,580.80 (Rec., pp. 110, 139). Thereafter, and on the 22nd day of August, 1905, the receiver executed a re-delivery bond (Rec., p. 115; Appellant's Brief, p. 7), whereupon the goods so seized by the sheriff were delivered to the receiver (Rec., p. 36), who mingled them with other goods of the estate (Rec., pp. 49, 139) and proceeded to sell out of the common stock in the usual course of business for cash and on credit, paying out of the proceeds the expenses of conducting said business (Rec., p. 139; Appellant's Brief, p. 7).

6. On August 23, 1905, Thad B. Landon resigned as receiver and John D. Townsley was appointed by the state court to succeed him (Appellant's Brief, p. 7).

7. On the 23rd day of September, 1905, the millinery company was duly adjudged bankrupt (Rec., p. 8), and on the same date Daniel F. Blake was appointed receiver in bankruptcy of said company (Rec., pp. 8, 9).

8. On September 25, 1905, Mr. Townsley, as receiver, by order of the state court, delivered the assets and property in his hands belonging to said millinery company to Mr. Blake as receiver in bankruptcy (Rec., p. 14).

9. On October 2, 1905, Mr. Blake as receiver in bankruptcy, sold, at public sale, all the assets and property of the millinery company (Rec., p. 45) for $38,300 (Rec. p. 46).

10. On October 13, 1905, at the first meeting of creditors Daniel F. Blake was elected trustee and thereafter duly qualified as such.

11. On the 27th day of October, 1905, Mr. Blake, as trustee, filed his bill of complaint in said bankruptcy court, wherein he prayed for an order restraining and enjoining appellants and their counsel from further prosecuting their replevin action in the state court (Rec., pp. 9, 10). On the same day the court made an order restraining the appellants and I. J. Ringolsky, their counsel, from proceeding further with the trial of said replevin cause, and directing appellants and their said counsel to be and appear before said court on November 2, 1905, and show cause why an injunction should not be issued (Rec., p. 16).

12. On November 3, 1905, said court made an order reciting that appellants appeared by Mr. Ringolsky, their counsel, and the restraining order was continued in force until the further order of the court (See certified copy of order). On the same day appellants filed a motion to dismiss said bill and dissolve the restraining order (Rec., pp. 17, 18).

13. On the 1st day of December, 1905, said court made the temporary restraining order perpetual, to which order no exception was taken by the appellants. No appeal was taken therefrom and the same is final (Rec., p. 20).

14. On December 10, 1905, a dividend of ten per cent was paid to the creditors in said bankruptcy proceedings (Rec., pp. 46, 146, 127).

15. On the 21st day of December, 1905, the appellants filed what is called an intervening petition before the referee, wherein they ask that the value of the goods seized by the sheriff under the replevin writ be allowed as a preferred claim and the balance of their account as a general claim (Rec., pp. 20-30). To which petition the trustee filed an answer denying the right of the appellants to have their claim so allowed. Thereafter the referee made an order allowing the claim of appellants in the sum of $2,582.80 as a preference, and the sum of $542.94 as a general claim, and ordered that the costs of the replevin suit instituted by appellants be paid out of the bankrupt estate (Rec., pp. 129-135). Thereupon, on March 24, 1906, the trustee filed exceptions to the referee's finding and order, and a petition to certify the same to the court for review (Rec., pp. 135-138). On April 30, 1906, the exceptions of the trustee to the referee's findings and order were by the court sustained and the order allowing $2,582.80 as a preferred claim was disapproved with directions to the referee to vacate the order allowing said preferential claim, and directing the same to be allowed as a general claim (Rec., p. 150). The opinion of the court below is found at pages 138-150 of the record, from which order this appeal is taken.

16. It will further be conceded, as an undisputed fact, that the property belonging to the said milinery company was perishable in its nature, and this fact was known to appellants (Rec., pp. 8, 46; and Ringolsky's letter, Rec., pp. 86, 88, at 88).

As to the foregoing facts there is and can be no dispute, as they are either shown by the record in the case or are admitted by the appellants.

The referee made findings of fact to a number of which the trustee excepted as not supported by any evidence; which exceptions were by the court sustained. These findings we will consider in the order as stated in the referee's report.

In his first finding of facts the referee states: "that the millinery company desired to purchase goods on credit of the appellants; thereupon appellants wrote the millinery company for a statement but Mr. Lewis testified that after this statement was made the directors to whom the indebtedness was owing obligated themselves personally for the benefit of the company in the following amounts: Mr. Lewis, $1,250; Mr. Miller, $1,250; Mr. McCarren, $10,000. He further testified, "It was prepared by Mr. Walkeen and myself, Mr. McCarren wasn't in the city. I called Mr. Walkeen's attention to the fact that I had not included the moneys owing to the members of the corporation, and that I wouldn't include the $5,000 worth of accounts that we had arranged to be paid when our fall season began, but I was making statements of the demands that were made on us then, a truthful statement he could present to the New York firms of what we had to pay with then and what we had to pay for." (Rec., p. 55.) "It was a truthful statement of what it purported to be." (Rec., p. 56.) "It wasn't a trial balance statement; it was never put out by me as a trial balance statement. Your Honor, it was a truthful statement of what it was called. What was put in the statement was directly at the request of Mr. Walkeen, to put him in a position to tell the people just exactly what we had at the beginning of the season. There was no intention to misuse the money that had been advanced by the members of the corporation, but it was our intention at a subsequent time to increase the capital, it was to be taken in stock, and when we could we were to pay ourselves," (Rec., p. 56).

"The purpose was to tell the creditors exactly the condition of the business at that time, as could possibly interest them, and to leave it for them to judge whether they would sell us goods, (Rec., p. 57). The accounts receivable due the millinery company were put in the statement at nine or ten thousand dollars less than our books showed," (Rec., p. 59). Lewis expected the business to continue and there was nothing to indicate that the company would not be able to pay its debts as they matured (Rec., p. 60). The same

statement that was sent to appellants by Lewis was also sent to ten or twelve other firms from whom goods were thereafter purchased. A large part of the indebtedness owing by the company at the time of the failure was incurred for the purchase of merchandise after these statements were sent out (Rec., pp. 61, 62). Lewis had no idea that the company would fail until two days before the receiver was appointed. (Rec., p. 57.)

It is inconceivable to us how the referee could find from this evidence, which was introduced by appellants themselves, that the statements made to appellants by Lewis and Walkeen were grossly false and made for the purpose of concealing its real and unsound financial condition. There is nothing in this entire testimony which indicated an *intent to defraud* appellants or not to pay for the goods purchased from them. But in this connection we desire to call the court's attention to the fact that the *referee did not* find that these statements were made *with the intent to defraud appellants or to get the goods from them and not pay them therefor.* We insist the court was right in sustaining the exceptions to the referee's finding of fact number one, as not sustained by the evidence.

There were other findings of fact made by the referee not fully sustained by the evidence to which we shall advert in presenting the legal propositions involved in this case.

The goods taken from the receiver, Landon, by the sheriff under the writ of replevin, were returned to said receiver and were then mingled with the common mass of the other goods of the millinery company, and their identity in kind or otherwise was lost so that appellants were unable to trace any part of their goods, either in kind or their proceeds, in an altered form, into the hands of the receiver or trustee in bankruptcy, neither does the evidence show that the funds in the hands of the receiver or trustee in bankruptcy were swelled thereby, (Rec., pp. 144, 145, 149).

No demand was made by appellants on any one for the possession of the goods claimed by them, who had any right or authority to deliver the same to them (Rec., p. 144), neither does the evi-

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dence show that any notice was given by the appellants to any one connected with the bankrupt company, or any of the receivers, of its disaffirmance of the contract of sale.

BRIEF.

I.

It is the contention of the trustee that the appellants had no right to interfere with the property of the millinery company afer a petition in bankruptcy was filed against it, by instituting a replevin suit in the circuit court of Jackson County, Missouri, and that the bringing of such suit and the levy made by the sheriff of Jackson County under the writ of replevin were unlawful and unauthorized acts and the appellants could not and did not conserve any rights thereby.

It will be observed at the outset that this question goes directly to the jurisdiction of the bankruptcy court over the *res* of the bankrupt after the filing of an involuntary petition in bankruptcy.

The millinery company committed an absolute act of bankruptcy when it permitted and consented to the appointment of a receiver by the state court, because of its insolvency and permitted such receiver to take charge of its property. *Subd.* 4, *Sec.* 3, *Bankruptcy Act*, 1898, *as amended February* 5, 1903.

The effect of the filing of the petition in bankruptcy in due form against the millinery company is stated by the district court on review, as follows:

"The legal effect of this was a *caveat*,—a warning *in rem* —to all the world that the estate of said insolvent had passed under the jurisdiction of the bankrupt court, and so *instanter* it operated as an attachment of the property of the bankrupt or as an injunction against all other creditors and persons, to not thereafter interfere with the estate. In contemplation of law, the estate was thenceforth in *custodia legis*. *In re Granite City Bank*, 137 Fed. loc. cit. 818. * * *

"Without discussing what was the immediate effect of the petition in bankruptcy on the pending suit in the state court, and conceding that it in nowise affected any existing superior right of the

claimants to the goods in question, it is sufficient for the purpose of this case to say that its effect was to notify all creditors of the insolvent estate that so far as they were concerned the property—the estate of the debtor, was subject to the jurisdiction of this court. No creditor or claimant of the estate could thereafter meddle with the property or assert any right to, or lien thereon except through and by a proceeding in this court. *This claimant through its counsel admitted in argument on this review that on the day following the filing of the petition it had actual knowledge of the proceeding in bankruptcy*" (Rec., pp. 143-144).

This view of the court is sustained by an unbroken line of decisions under the present bankruptcy law.

In *Mueller* v. *Nugent,* 184 U. S., 1, the Supreme Court, speaking through Chief Justice Fuller, said:

"It is as true of the present law as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction. *Bank* v. *Sherman,* 101 U. S., 403, and on adjudication, title to the bankrupt's property became vested in the trustee. Sec. 70, 21e with actual or constructive possession, and placed in the custody of the bankruptcy court."

In *Bank* v. *Sherman,* 101 U. S., loc. cit. 406, the court said:

"The filing of the petition was a *caveat* to all the world, showing its financial condition. In response the millinery company, through its secretary, on July 7th of said year, (1905), forwarded to appellants what purported to be a statement showing its assets and liabilities as they existed on the first of that month. About that time the president, Mr. Walkeen, went to New York and visited the appellants with a view of purchasing goods of them on credit, but they were unwilling to sell or ship his company anything on the statement that had been forwarded to them by the secretary of the company, and required a more detailed and specific one before they would sell on the credit desired. Whereupon Mr. Walkeen, for the millinery company, made and signed a very full and detailed statement, showing, among other things, the amount of its stock on hand, open accounts, cash on hand, etc., and in response to specific written questions the amount of its liabilities, to whom and in what amounts it was indebted, and whether it was behind in its payments. This written statement was signed in New York, July 13, 1905."

The only evidence introduced at the trial in support of this finding is that of Arthur Ronald (Rec., pp. 69-73), who was the credit man of appellants, and who passed upon the credit which was extended to the millinery company, who testified that the millinery company had been purchasing goods from appellants since the company first started in business, and that it was not indebted to them on July 13th. *On that date* Mr. Walkeen came into appellant's office at their request, and then stated:

"Q. Just recite the conversation that took place between yourself and Mr. Walkeen, at that time? A. I told Mr. Walkeen that owing to the fact that he was *reported as being slow in his payments in the trade,* and was much criticised by the trade, I wanted to know just where they stood before I shipped them any goods; that without knowing I could not make them an shipments; and he thereupon made me this statement.

Q. What statement do you refer to, the statement dated July 13, 1905? A. Yes.

Q. Prior to that had you been in correspondence with the firm at Kansas City? A. We had been in correspondence with the firm; he had goods that they had ordered some time previous, and when Mr. Walkeen was on to see us in January of this year, we shipped him his spring goods on a statement he made us then, and told him that we would *not ship him any goods that he might buy* until we saw the condition of the firm from *its mid-summer inventory.* We wrote to the concern for *their mid-summer inventory,* and that was the reply to the letter; and hearing that Mr. Walkeen was in town, I had Mr. Walkeen come to see me, which brought forth the statement of July 13th. * * *

Q. When Mr. Walkeen was here in the city you had a conversation with him about the condition of the company? What was the date of that conversation? A. July 13th.

Q. What was the substance of that conversation? A. He told me that the merchandise on hand was all in good shape; that they had no dangerous stock left; that it was all worth 100 cents on the dollar; that it contained, however, $32,000 worth of velvets and silk goods, purchased in the fall of 1904, which were in big demand this year, so that there would be no loss attached to carrying the stock; that they had made a net profit of over $5,000 this spring, and accounted for the fact by saying that their purchases last spring were $25,000 less than a year ago, and the profit in the merchandise sold them heretofore; and that they had materially reduced their expense account. That Walkeen and Lewis had re-

duced their personal drawings by $1,800 per year between them; that they had reduced their expense account about 5%; that none of their merchandise liabilities were past due; that they had no liabilities for endorsements or other moneys, aside from the $30,000 borrowed from the bank, except moneys, left on deposit by Walkeen & Lewis, $1,810.15, and some of their employes to the amount of $746.50; he said that 40% of their sales were in Kansas City, and practically cash credit. He further stated that their outstanding accounts were worth fully 100 cents, and that the book value was much in excess of the amount of the statement."

He further testified that on that day he obtained a written, signed statement from Walkeen. That after this conversation and after having obtained the statement from Walkeen appellants shipped the millinery company $3,125.74 worth of merchandise on credit; that afterwards the amount was credited with $13.32. The witness further testified that he relied on said statements in extending credit to the company, and that he would not have extended the credit had he known that the facts were different than as represented by Walkeen, and the statements.

Upon the evidence the referee made the finding as above set out.

It will be seen that the millinery company made no application for credit to appellants until July 13th, when Walkeen, *at the request of appellants*, called at their place of business; that no request was made prior thereto by appellants for a statement of the millinery company's *financial condition*, as found by the referee. There is no evidence to support the finding of the referee that appellants were unwilling to sell or ship the millinery company any goods on the strength of the statement mailed to them on July 7th; and that they required a more detailed statement. It will be noticed that Mr. Ronald's testimony does not in any way support this finding. It will further be noticed that appellants had a financial statement made by the millinery company in the spring of 1905, and all they wanted in addition to that was the *mid-summer inventory* of the company; that the condition and prospects of the company were fully discussed by Mr. Walkeen, and *none of the facts, as stated by Wal-*

keen in the conversation of July 13th, are anywhere shown to have been untrue or that they were made fraudently.

In the second paragraph of the first finding of facts the referee finds "that the material portions of *this statement* and which were best calculated to induce credit, were false." Whether the referee refers in this finding to the statement sent appellants on July 13th, or the oral statement made by Walkeen on the same day, we are not advised. The referee further finds, "that the statements in regard to the amount of liabilities of said millinery company were grossly false, and so made for the purpose of concealing its real and unsound financial condition, and obtaining credit of said appellants." These findings of fact were disapproved by the court on review as being unwarranted by the evidence (Rec., pp. 141, 142). The only evidence upon which this finding of fact could be based is that of Charles M. Lewis, the secretary and treasurer of the company, (Rec., pp. 48-65), who was called as a witness by appellants, and who therefore vouched for his credibility. We submit that a careful reading of his evidence affords no justification for the findings of the referee.

It is contended by appellants and the referee so found, that because the written statements made to appellants by Lewis and Walkeen omitted the indebtedness due the directors and stock-holders, amounting to $14,500, that therefore these statements were false and were so made for the purpose of defrauding appellants. The reason, however, why this indebtedness was not included as given by appellants' witness, Mr. Lewis, was. that an agreement or understanding had been reached between the stockholders that the capital stock of the company should be increased and stock should be issued to these parties to the amount of this indebtedness. This had progressed so far that the papers for the increase of stock had already been drawn up. Had this agreement been perfected this indebtedness would have been wiped out by the issuing of stock, but before this was accomplished the failure occurred. Not only this,

It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. If that were in his favor they revived and were again in full force. If it were against him, they were extinguished as to him and vested in the assignee for the purpose of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civiliter mortuus.* Those who dealt with its property in the interval between the filing of the petition and the final adjudication did so at their peril. *They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction.* With the intermediate steps they have nothing to do. *The time of the filing of the petition and the final result alone concern them."*

In the light of this decision and probably for the purpose of conforming with the rule as it existed under the law of 1867, congress provided in the Act of 1898, Sec. 70, that "the trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt. * * * to all (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon the sold under judicial process against him."

In re Granite City Bank, 137 Fed. Rep., 818, this court, after quoting from *Bank* v. *Sherman, supra,* and *Mueller* v. *Nugent, supra,* said:

"Upon the selection and qualification of a trustee, all the rights, title and interest of the bankrupt, *as of the time of the filing of the petition in bankruptcy of any property or property rights,* by operation of law * * * pass to and vest in the trustee, who then becomes the custodian for the court. The possession of the bankrupt without more, is transferred to the trustee."

In the recent case of *In re Schermerhorn,* 145 Fed. Rep., 341, decided by this court, Judge Hook, speaking for the court, said:

"Upon the filing of a petition in bankruptcy, followed by an adjudication, all of the property in the possession of the bankrupt of which he claims the ownership, passes at once into the

custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine, by plenary action or summary proceedings, as the nature of the case demands, all adverse or conflicting claims thereto, whether of title or lien; and that court may, by the process of injunction, protect its jurisdiction against interference. It may draw to itself the determination of all controversies over the property in its possession, and when it once lawfully attaches its jurisdiction cannot be destroyed or impaired by the unauthorized surrender of possession of the property by the officers of the court, or through a seizure thereof. (*Whitney* v. *Wenman*, (U. S.), 25 Sup. Ct., 778, 49 L. Ed., 1157; *Mueller* v. *Nugent*, 184 U. S., 1; *White* v. *Schloerb*, 178 U. S., 542; *Chauncey* v. *Dyke Bros.*, 55 C. C. A., 579; 119 Fed., 1; *In re Corbett*, 104 Fed., 872; See also *In re Rochford*, 59 C. C. A., 388, 124 Fed., 182."

To the same effect is *In re Pekin Plow Co.*, 112 Fed., 308.

In Loveland on Bankruptcy, p. 374, 2nd Ed., the rule is stated as follows:

"Where *property of another person is in the actual possession of the bankrupt after the filing of the petition* and before the trustee or other officer of a court of bankruptcy acquired actual possession of it, *the possession cannot be recovered by replevin instituted in a state court.* The reason is, the filing of the petition is a *caveat* to all the world and in effect an attachment and injunction, and a court of bankruptcy acquires *constructive custody of all property in the possession of the debtor from the time of filing the petition*, and the rule heretofore stated applies to such property as much as to property in the possession of a trustee."

In re Knight, 125 Fed., 35, the rule is stated in the syllabi as follows:

"When a general assignment for the benefit of creditors is made by a debtor, the same an act of bankruptcy, the right immediately arises in his creditors to have his estate administered under the bankruptcy law; and when the enforcement of this right demanded by a proper proceeding within four months after its inception, *no action by any court in any suit brought after the commission of the act of bankruptcy can defeat it, without the consent of the bankruptcy court, whose jurisdiction is exclusive*, and on the making of the adjudication, relates back to the act of bank-

ruptcy." See also *In re Mertens, et al,* 131 Fed., 507; *In re Breslaur,* 121 Fed. 910.

In re Hymes Buggy v. *Impdement Co.,* 130 Fed., 977, it was held that seizure of property under a writ of replevin within four months prior to the filing of the petition in bankruptcy against the party from whom the property is replevined, is void under Sec. 67-f of the bankruptcy act.

In re Weinger, Bergman & Co., 126 Fed., 875, the rule announced is stated as follows in the syllabi:

"Where property of a bankrupt is held adversely to his estate under a claim of seizure on process from a state court, the court of bankruptcy has jurisdiction to summarily inquire and determine whether the adverse claim has an actual basis, or is merely colorable; and where it determines that the seizure was by an abuse of process—*as where the taking was after the filing of the petition in bankruptcy on a writ of replevin* which did not describe the property, but other and different property—the court has power to order its surrender by the person in possession to the trustee or receiver in bankruptcy.

"A bankrupt's property is within the jurisdiction of the bankruptcy court as soon as the petition is filed, as far as to prevent a state court, which subsequently seizes it, from being held to have first obtained exclusive jurisdiction."

Collier on Bankruptcy (5th Ed.) 562, says: "But when the property is in the custody of the bankruptcy court, it is immune from replevin process in the state court."

From these authorities the necessary and unavoidable result of this rule of law is, that no replevin action can be instituted or maintained in a state court to recover property after a petition in bankruptcy is filed against the party having the possession of the property sought to be replevined, because after the filing of the petition in bankruptcy all of the property or property rights of the bankrupt is under the exclusive supervision and control of the bankruptcy court to the same extent as if such court had made an

order attaching the property and restraining all persons from in any way interfering or intermeddling therewith.

In the case at bar the act of bankruptcy was committed by the millinery company on August 12. On August 15 a proper petition in bankruptcy was filed against it and no steps of any kind were taken by appellants to rescind the sale until after such petition was filed, and not until August 21st, when with full knowledge of the pendency of the bankruptcy proceedings they instituted a replevin action in the state court to gain possession of part of the property belonging to the millinery company. It is claimed by appellants that the sale of these goods by them to the millinery company was induced by means of fraud, but even if this were true, the sale would not be absolutely void but *voidable only*. So that the millinery company could, prior to the filing of the petition, have sold the goods and passed a good title thereto, or they could have been levied upon and sold under judicial process against it, hence it was such property as would have passed to the trustee under Sec. 70 of the bankruptcy act. The *status of the property* of the bankrupt company, as it existed at the *time of the filing of the petition, can in nowise thereafter be altered or changed save and except by and through the bankruptcy court.*

If, then, as the district court held, the property of th Millinery company, from and after August 15, 1905, the time of the filing of the petition, was in contemplation of law in the constructive custody and control of the bankruptcy court, and the appellants had no right thereafter to institute or maintain a replevin suit in the state court, and thereby interfere and intermeddle with said property, then such interference by writ of replevin was a wrongful, unlawful and unwarranted act and the appellants can conserve no rights and can derive no benefits therefrom.

For, if, as the courts have said, the filing of the petition in bankruptcy was in effect an attachment on the property and an in-

junction against all persons from interfering therewith, and the replevining of said property by appellants constituted a wrongful and unwarranted intermeddling therewith in violation of such injunctive force of the filing of said petition, it would certainly be an anomalous situation if appellants by such wrongful and illegal acts could acquire rights thereby.

Appellants bottom their right to recover upon the institution of the replevin suit in the state court. The district court in passing upon the case, said:

"It is perfectly evident from the motion made in this court by the claimant to have the temporary injunction dissolved and from its petition presented to the referee in bankruptcy, that they predicate their preferential right upon the reclamation proceedings in replevin in the state court; and throughout the referee in bankruptcy in his opinion attaches much importance thereto. Whereas the law is that the claimants obtained no right or advantage by such proceeding. No demand was at any time made by this claimant upon anyone who had, as against the creditors represented by the bankrupt court, a right to surrender the goods. The bankrupt court alone had jurisdiction to afford relief if any, to the claimant as a preferential creditor, either to the goods in kind or their proceeds. *In re Whitner*, 105 Fed., 180; *Fisher* v. *Cushman*, 103 Fed., 867; *In re Weinger, Bergman & Co.*, 126 Fed., 875." (Rec., p. 144).

Hence it must be conceded that if the foundation upon which appellants have builded their case is unsound, the entire superstructure must fall. That the bringing of the replevin suit was entirely wrongful and unauthorized we think is too well established by the authorities heretofore cited to require further consideration.

It is the contention of the trustee that appellant's preferential claim is presented to the bankruptcy court unaffected in any way by the replevin suit brought in the state court. In fact the question, whether the replevin suit was rightfully brought in the state court, we contend is no longer open in this case. It will be

observed from the bill filed by the trustee (Rec., p. 12), for an injunction against appellants from proceeding further in the replevin suit, and the motion filed therein by appellants (Rec., p. 17), that this identical question was before the court, and in granting the perpetual injunction against appellants *that question was necessarily determined by the court against them.* No exception was taken to this action of the court, neither has an appeal been taken therefrom, but the same is final, and appellants cannot now be heard to complain thereof. It is *res judicata* in this case, and cannot be collaterally attacked. It is a final determination of the question and binding upon appellants. The court, under the pleadings, necessarily held in granting the injunction, that appellants had no right to institute or maintain the replevin suit in the state court, which order is final and conclusive in this case. They cannot try the replevin suit in the bankruptcy court. If they were dissatisfied with the injunction granted against them they should have appealed therefrom. If they had a right to institute the replevin suit in the state court they would have had a right to prosecute it to a final determination, but being enjoined from prosecuting said suit they cannot now claim any rights thereunder.

II.

Under the facts as shown by the record in this case appellants are not entitled to rescind the contract of sale or to recover on the intervening petition herein and would not have been entitled to recover the goods had they been in the hands of the trustee at the time the intervening petition was filed, and they would have been able to identify them, because, (a) there was no such fraud practiced by the bankrupt company in the purchase of the goods as would authorize a rescission of the contract of sale on the part of appel-

lants; (b) there was no notice given of the intention to rescind such contract; (c) there was no demand made for the possession of the goods on any one authorized to comply with such demand; neither was the millinery company placed in *statu quo;* (d) no attempt was made in the bankruptcy proceedings to recover the value of the goods until after the rights of the other creditors of the bankrupt company intervened and became fixed to the fund in the hands of the trustee; neither did the appellants promptly upon learning of their right to rescind, if they had such right, take the proper and necessary legal steps to rescind such sale.

(a) To authorize appellants to rescind the contract of sale they must show that the property statement or financial representation was false in what it purported to be, that it was known to be so by the parties making it and was made for the purpose of defrauding appellants and that appellants relied upon the truthfulness of the same in extending credit.

In re O'Connor, 112 Fed., 666, the rule as declared in that case is stated in the head note as follows:

"It is not in harmony with the purpose of the bankruptcy act which is to secure equality between creditors, to permit all creditors who sold goods to a bankrupt, which they can identify, to rescind the sale and reclaim such goods on the ground that they were purchased in pursuance of a general scheme to defraud, where other creditors having an equal right to a recission, cannot enforce it because their goods were disposed of. *Clear proof of fraudulent representations that they were wilfully made*, and were the inducement to the sale, is required to entitle a seller to rescind, and recover the goods sold, after the bankruptcy of the purchaser."

In Loveland on Bankruptcy, 2nd Ed., p. 375, the rule is stated in this language:

"To justify a rescission there should be a clear showing of *deliberate and intentional fraud;* the mere knowledge of insolvency and a failure to disclose it is not sufficient. * * * But if the vendor does not take steps to rescind the sale the title passes to the bankrupt and to the trustee."

In the recent case of *In re Levi & Pickard,* 148 Fed., 654, it was held to be established "that what entitles a vendor to disaffirm a contract of sale and recover his goods consists in the vendee's inducing the vendor to sell him goods on credit, when he was (a) insolvent, (b) concealed his insolvency, and (c) did not intend to pay for what he bought."

The learned judge in his opinion in the case at bar, (Rec., p. 140), said:

"To entitle the vendor to rescind a sale of goods and reclaim the same, or the proceeds thereof, the law imposes upon him some imperative obligations. As applied to this instance, in the first place he must show that the goods were obtained upon fraudulent representations by the vendee as to his financial condition, and that the vendor in parting with the goods did so upon the faith of the truth of the matters so represented. In the second place, he must immediately upon discovering the fraud, give notice of his purpose to rescind and reclaim the goods, and he must follow up this notice promptly with a demand for the goods before the rights of third parties become involved. Such notice and demand to be effective must be given to and upon him who is in position to comply therewith."

The evidence introduced by appellants themselves, that of Mr. Lewis, hereinbefore referred to, shows that the statement made to appellants was a *truthful statement of what is purported to be,* and was certainly all that appellants wanted to know. Mr. Ronald, the credit man of appellants, in his deposition states that he had a statement from the millinery company in January, 1905, and before selling them further goods on credit he wanted only a *statement of their mid-summer inventory.* There is no pretence anywhere that the statement did not correctly show the assets of the company as per the inventory taken July 1, 1905, except that the company had nine or ten thousand dollars in book accounts that were not shown in the statement. The indebtedness was fairly stated when taken in connection with the statements made by Mr. Walkeen to Ronald in the conversation of July 13th, for at that

time Walkeen explained about the salary due to himself and the other officers of the company and to the employes. The only thing that appellants complain of is that the statements did not show the indebtedness due the members of the corporation for borrowed money, but in view of the fact that an arrangement had been entered into by which stock of the company was to have been issued for this indebtedness Mr. Walkeen and Mr. Lewis were justified to treat that, not as an indebtedness of the company, but as a subscription to the capital stock. As stated by the witness, Lewis, the aim was to state exactly what the company was called upon to pay, and what it had to pay with. This is all the statement purported to be, and this information was correctly stated.

(b) But even if there had been such a misrepresentation by the millinery company as would have authorized appellants to rescind the sale, they gave no notice of their intention to rescind, which is one of the necessary elements of a rescission. Neither did they tender back to the millinery company the consideration of $13.32 received on account of said goods. The contract of sale being at most voidable only, the title to the property passed to the bankrupt company, and remained vested in it until appellants took the proper and legal steps to revest the title in them. No notice was given to the receiver in the state court or the receiver in bankruptcy, or to the millinery company itself that appellants had rescinded the contract of sale or intended to do so. The only thing they claim to have done prior to bringing the replevin suit was to make demand on Mr. Landon, the receiver in the state court, for the possession of certain goods, which is denied by Mr. Landon, but even this demand, if made, was not made until after the petition in bankruptcy was filed and they had actual notice and knowledge thereof. Conceding, for the sake of the argument, that on August 21, 1905, Mr. Ringolsky as attorney for appellants,

made a demand over the telephone on Mr. Landon for the possession of certain goods, this can avail them nothing for Mr. Landon, as receiver, had no right or authority to comply with such a demand. Landon in his testimony states that when Mr. Sanger and Mr. M. Ringolsky came to his store and stated that they had come to make a demand on him, he called their attention to the fact that a petition in bankruptcy had been filed against the millinery company (Rec., p. 65). Not another act or thing was done by appellants to rescind the contract of sale prior to filing their intervening petition in the bankruptcy court on December 21, 1905, except to bring the replevin suit in the state court, which was an unlawful and unwarranted act.

In *Chemical Co.* v. *Nickells*, 66 Mo. App. 678, at 690, which was a replevin suit to recover goods alleged to have been purchased by means of false representations on the part of the purchaser, the court said:

"The plaintiff gave no *notice* of intention to rescind nor did it make a tender back to the Nickells Bros. of their notes or money received; nor, indeed, were there any other steps taken in the direction of a rescission of the contract before the suit was commenced. Even if plaintiff had introduced evidence tending to show that Nickells Bros. were insolvent and bought the goods with the intention of never paying for them, there was no evidence of a rescission of the contract, without which there could be no right of action in the plaintiff for the recovery of the goods."

In *Gaty* v. *Sack*, 19 Mo. App., 470, the court in discussing the rescission of a contract, used the following language: "But the party claiming the right of rescission must give notice to the other party to the contract of the fact that he does withdraw."

In Benjamin on Sales, Sec. 649, the rule is stated as follows:

"The rescission is the legal consequence of his (the defrauded creditor's) election to reject it, and takes date from the time at which he announces his election to the opposite party."

The same rule was stated in the recent case decided by this court in *Richardson et al.* v. *Lowe,* 149 Fed., 625.

Under the authorities it seems to us obvious that to rescind a contract of sale, induced by false representations, the defrauded creditor must either give notice to the opposite party of his intention to rescind, or he must take some *legal action* to revest the title in him. Neither of these things was done by the intervenors, and they cannot be held to have rescinded the contract of sale prior to filing the intervening petition before the referee in bankruptcy, certainly not prior to the sale of the goods on October 2, 1905. Even if it could be said that the filing of the intervening petition amounted to a rescission of the contract, we maintain the contract must have been rescinded and they must have taken some *legal steps to regain the property before it was sold by the bankruptcy court.*

(c) The evidence of Mr. Ronald shows that after the goods were sold to the millinery company by appellants they received $13.32 on account thereof, which was credited to the company (Rec., p. 72). This amount was not returned to the millinery company prior to the bringing of the replevin suit or at any other time. It is a well known rule of law that a voidable contract of sale, induced by fraud, cannot be rescinded by the vendor without first restoring to the vendee everything of value received on account of such sale so as to place the vendee in *statu quo.*

In the case of *Cohn* v. *Reid,* 18 Mo. App., 115, the question presented to the court was what was necessary to and what constituted a rescission of a contract induced by fraud, the court, said:

"But in such cases it is absolutely essential that the party wishing to assert this right should immediately on discovering the bad faith of the one with whom he has dealt, rescind the contract by making him *statu quo.* The rescission must be *in toto,* for one will not be permitted to adopt so much of a voidable con-

tract as he deems beneficial and reject that portion which it may be thought onerous." (18 Mo. App. 123).

"The rescission is the first thing to be done and is an absolute prerequisite to the right to sue." (18 Mo. App., 124.)

"The party aggrieved must do what he can to place the other *in statu quo,* and where it is possible this can only be done in a case like the present by a return or an offer to return, of what he has received in exchange for what he has given." (18 Mo. App. 125).

In *Case Plow Works* v. *Ross,* 74 Mo. App., 437, the court on passing on the same question, said:

"The rule of course is well settled that where a defrauded vendor seeks to rescind the contract and resume the possession of his goods he must first restore to the other party whatever of value, he, the vendor, may have received on account thereof, and until he has done so he cannot maintain replevin." (74 Mo. App. 445).

In the case at bar it is admitted that the consideration received by appellants, to-wit, $13.32, was not tendered back before the filing of the replevin suit or at any other time. Appellants in their brief attempt to evade the force and effect of this fact by saying that this was for merchandise retained, but there is nothing in the evidence to show that this is true. The only evidence is that of Mr. Ronald, as follows:

"Q. Was there any part of this shipment returned to you or did the account receive a credit for any sum at all? A. The account has since been credited with an item of $13.32, leaving the account net, $3,112.42." (Rec., p. 72)

(d) Appellants were obliged to act promptly on learning of the alleged fraud. They say they knew the statements made to them were false on August 16th, the day after the petition in bankruptcy was filed. (How they learned this fact is not shown unless they learned it at the time Wakeen had the talk with Ronald, as no investigation was made after that time). They also

knew the property of the millinery company was perishable in its nature, and therefore would have to be sold without delay in order to prevent the same from deteriorating in value; they knew that bankruptcy proceedings were pending, and yet notwithstanding their knowledge of all of these facts and that the property was not sold by the receiver in bankruptcy until October 2, 1905, they took no *legal steps* whatever to enforce their rights. They could have intervened in the bankruptcy proceedings the next day after the petition was filed, but with full knowledge of all the facts they instituted no legal action until after the property was sold by the receiver in bankruptcy and the rights of the other creditors of the bankrupt company intervened and became fixed to the fund in the hands of the trustee. As was well said by the district court (Rec., p. 144):

"By intervention in the bankruptcy proceedings the claimant could have asserted its preferential right to the goods and had them segregated, and the *statu quo* maintained until the rights of all parties in interest could have been established by this court. Instead of this proper course the claimant went around the bankruptcy court, and in the meantime suffered the receiver of the state court to destroy the identity of the goods claimed by mingling them with other goods of the estate and selling them, so that, as *admitted in argument by counsel for claimant, it became impossible not only to identify the goods claimed or to point out into what asset of the estate turned over to the receiver in bankruptcy it passed, if it so passed at all.*"

Even if the property was obtained by the Millinery Company from appellants by means of false representations, the contract of sale at most was voidable only and not void. The title to the property passed to the bankrupt company and remained vested in it as its own until appellants took some proper and legal steps to revest the title in them. The millinery company held the property as its own and not in trust for appellants. It could have sold it and given a good and indefeasible title thereto as against appellants.

In this connection we desire to call the attention of the court to the fact that while appellants in their intervening petition sought to recover as on a claim for damages for the conversion of property, the referee allowed the claim on the theory that the trustee had in his possession a trust fund belonging to appellants. There is no finding of fact made by the referee that would warrant a recovery on either theory. The referee nowhere finds that the property sold by appellants to the millinery company, either in kind or its proceeds in an altered form, came into the hands of the receiver or trustee in bankruptcy, or that the funds in his hands were swelled to the amount thereof. Neither does he find that the receiver or trustee in bankruptcy converted said goods for there is no showing that the goods ever came into his hands.

The trustee contends that the only remedy open for appellants to pursue after the petition in bankruptcy was filed was to promptly institute reclamation proceedings in the bankruptcy court. They had full knowledge of all the facts that would entitle them to rescind the contract of sale on the next day after the petition in bankruptcy was filed, that the property was perishable and that to save loss from deterioration the same would have to be sold without delay; they knew the bankruptcy court had exclusive jurisdiction over the property after the filing of the petition, and yet, notwithstanding all this, they took no steps to reclaim the property in the bankruptcy court until the 21st day of December, 1905, after all the assets of the millinery company were sold by the receiver in bankruptcy. It was their plain duty immediately upon learning of their right to reclaim the property to institute proceedings in the bankruptcy court for that purpose and have the same segregated from the balance of the goods belonging to the bankrupt company, and held until their rights could be determined. But instead, they chose to stand by and permit the receiver of the

state court to commingle their property with the balance of the assets of said bankrupt company so as to lose its identity and to permit the same to be sold and the proceeds arising therefrom to be used in defraying the running expenses of conducting the business.

If it be assumed for the purpose of argument that the goods sold by appellants were in the assets which came into the hands of the receiver in bankruptcy, either in kind or in the form of accounts receivable, yet inasmuch as appellants permitted the same to be commingled with the balance of the assets, they are not thereby entitled to impress a lien on all of the assets to the value of their goods. At most, they would only be entitled to what the receiver in bankruptcy received for their goods or the accounts derived therefrom. The referee found that it was impossible to say how much of the merchandise that had been replevined and taken back by the receiver of the state court under redelivery bond, remained in the store at the time of the adjudication, or what portion of that particular stock in question remained on hand at the time of, and that was included in, the sale in bulk by the bankruptcy receiver (Rec., p. 124). The total invoice of the assets sold by the receiver in bankruptcy was $118,428.16; these were sold for $38,300 (Rec., p. 133), or about thirty-three cents on the dollar. Now, if we assume for the purpose of the argument that all of the goods replevined were in some form in these assets when they were sold by Mr. Blake as receiver in bankruptcy, the very most that can be said is, that he received thirty-three cents on the dollar for them. It would certainly be inequitable to pay appellants 100 cents on the dollar for their goods when the receiver only received thirty-three cents on the dollar for them, because the other sixty-seven cents would have to be contributed by the other creditors out of their own pockets. Instead, therefore, of being equality of dis-

tribution among the creditors there would be the greatest inequality. The evidence of Mr. Lewis shows that a large part of the indebtedness was contracted by the company after the statements of July 1, 1905, were sent out to the creditors, being the same statement that was sent to appellants. It is fair to assume that the other creditors in selling goods to the millinery company were influenced in extending credit just as much by that statement as were appellants, and yet appellants now come in and say that the other creditors should contribute 67% of the amount of their goods to them so they can get 100 cents on the dollar while the other creditors would receive about twenty. It is difficult to imagine a more flagrant injustice and inequality than this would be.

It is contended by the appellants that inasmuch as the state court had appointed a receiver who had reduced the assets of the bankrupt company to his possession prior to the filing of the petition in bankruptcy that therefore the state court had unimpaired authority and jurisdiction to administer upon the assets of the millinery company and the leave granted by that court to appellants to bring a replevin suit against the receiver of the state court made the institution of such replevin suit a legal and lawful proceeding under which appellants could conserve their rights to the goods theretofore sold to the bankrupt company.

As we understand it, appellants' position is, where one of two courts having concurrent jurisdiction obtains jurisdiction and reduces to its possession the property of an insolvent, that that court will retain jurisdiction in exclusion of the other court. This principle is undoubtedly true where courts have *concurrent* jurisdiction of the subject-matter. But it is not true where one court is invested with *exclusive* jurisdiction as to the subject-matter. In many instances state and federal courts have concurrent jurisdiction over the subject-matter relating to insolvents' estates, but in bank-

ruptcy matters, the federal courts are invested with *exclusive jurisdiction* of the administration of insolvent or bankrupt estates, the same as federal courts are invested with exclusive jurisdiction relating to the libel of vessels in admiralty cases. This principle has always been recognized by the courts in determining the jurisdiction of state and federal courts.

In re Watts and Sachs, 190 U. S., 1, at 27, the Supreme Court said:

"The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons or corporations, is essentially exclusive. * * * The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, *but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent.*"

The case of *Chapman* v. *Brewer,* 144 U. S., 158, arose under the Bankruptcy Act of March 2, 1867, in which an attachment was levied upon the property of the bankrupt issued by the state court prior to the assignment in bankruptcy, and it was there held that notwithstanding the fact that the state court had reduced the property to its possession through the attachment prior to the commencement of the bankruptcy proceedings, yet the bankruptcy court had *exclusive jurisdiction to administer the estate,* and had authority and jurisdiction to restrain by injunction a sale under the levy of the attachment.

In *Moran* v. *Sturgis,* 154 U. S., 256 was a case in which on the 31st day of July, 1891, proceedings were commenced in the supreme court of the state of New York for the voluntary dissolution of a steam tow boat company, a corporation organized

under the laws of that state, and an order was entered on that day restraining the creditors from bringing any actions against the said tow boat company and to show cause before the referee therein named why the prayer of the petitioner should not be granted. An order was made at the same time for the appointment of a receiver which required him to give bond before entering upon the discharge of the duties of his office.

On the first day of August, 1891, in the forenoon of that day these orders were entered and the papers filed in the office of the clerk of the court.

On the afternoon of the same day, which was Saturday, and on Monday, August 3, 1891, libels in admiralty were filed in the district court of the United States for the Eastern District of New York to enforce maritime liens against six of the vessels of said Tow Boat company's fleet. On the first of August the marshal for the district seized and took into custody three of the six boats, and on the third of August did likewise with the other three. On the fourth of August the receiver filed his official bond, duly approved, and entered upon the discharge of his duties. On the same day he went to take possession of the six vessels and found them in the custody of the marshal. It was contended that the state court having appointed its receiver prior to the libels of the vessels in the federal court, that it was entitled to retain jurisdiction of the vessels and administer as to the equities of all the parties including libelants.

Chief Justice Fuller in a very exhaustive opinion in which numerous authorities are reviewed relating to the concurrent jurisdiction of state and federal courts said:

"It must be taken as the settled law of this court that wherever the district courts of the United States have original cognizance of admiralty causes, by virtue of the Act of 1789, (Section 711, Revised Statutes), that cognizance is *exclusive*, and no other court, state or national, can exercise it, with the exception always

of such concurrent remedy as is given by the common law." 154 U. S. 276.

Again he says:

"But where the jurisdiction is not concurrent, and the subject-matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may be, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and, under these state statutes, is adopted to defeat fraudulent, unwarranted, and unjust disposition of the debtor's property and to accomplish just and equitable ends." 154 U. S. 284.

Again it is said:

"The title and the right of possession as between the receiver and the creditors of the Schuyler Company may have vested as of July 31, *but this could not operate to divest a jurisdiction, not concurrent*, to the exercise of which no actual impediment existed at the time it was invoked. As has been seen, maritime liens are incumbrances placed on vessels by operation of law, and neither the death nor the insolvency of the owner can divest or extinguish them, or transfer jurisdiction over them to courts for the settlement of the estates of decedents or insolvents, although for the purposes merely of such settlement these are the appropriate tribunals. In the orderly administration of justice the representatives of such estates should apply to the *court which alone has cognizance* to ascertain and enforce these exceptional interests in the thing itself, which accompany it wherever it goes, and into whosesoever hands it comes, and which cannot be displaced by the action of other courts *in invitum*." 154 U. S. 285.

In at least two classes of cases, as heretofore stated, viz: admiralty and bankruptcy matters, the jurisdiction of the federal courts is exclusive as to the administration of such assets.

The case of *Watson* v. *Citizens Savings Bank*, Federal case No. 17279 arose under the Bankruptcy Act of February 13, 1873, which provided that where proceedings have been commenced in

a state court against a corporation prior to commencement of proceedings in bankruptcy against the same corporation, any order made by the state court agreeable to the state law for the ratable distribution or payment of any dividend or assets to creditors while such state court shall remain actually or constructively in possession or control of the assets of such corporation shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such company. Notwithstanding this statutory enactment, which was entirely omitted in the Act of 1898, it was held:

"That although the state courts have jurisdiction under their statutes, to settle and arrange the affairs and distribute the assets of an insolvent corporation, *their jurisdiction is at an end the moment the corporation is adjudicated a bankrupt by the district court;* and in this respect we can see no difference between the proceedings of a state court under a particular statute relating to insolvent corporations, and its proceedings under its general powers as a court of equity to wind up the affairs of an insolvent corporation."

"That we are of the opinion that the Act of Congress of February 13, 1873, applies only to such orders relating to the ratable distribution or payment of dividends as the state court may have passed *prior to the commencement of proceedings in the district court or prior to its adjudication in bankruptcy for the ratable distribution or payment of dividends.*"

The case of *Lea et al.* v. *George M. West Co.*, 91 Fed., 237, is a case where a corporation had made a general assignment for the benefit of its creditors and the state court on a bill in equity had appointed the assignee as receiver to take charge of the assigned estate and wind up the affairs of the assignor, after which the corporation was adjudged bankrupt. It was held that the jurisdiction to administer and distribute the entire estate of the bankrupt belonged to the bankruptcy court to the exclusion of the state court, and that the bankruptcy court might enjoin all parties from further proceeding in the state court.

Judge Waddill in the course of the opinion said:

"Litigation in each court involves the administration of the entire estate of the bankrupt; one court or the other must proceed. If the assignment is in itself an act of bankruptcy, and the makers thereof have been adjudged bankrupts, then this court has to proceed, and therefore must be possessed of the bankrupt's estate; for otherwise the anomalous position would exist of one court dealing with the bankrupt and his creditors, and the other court administering his estate. The power of a bankruptcy court in the premises is plenary, and under Section 711, Revised Statutes of the United States, its jurisdiction in bankruptcy cases *is superior to and not concurrent with the state courts*, and by section 720 (id.) and Section 11, of the bankruptcy law it is specially authorized to issue injunctions against the parties and stay proceedings in state courts when necessary for the exercise of its jurisdiction."

Under the amendments of 1903, it is made an absolute act of bankruptcy for a corporation or individual being insolvent to apply for a receiver or trustee for his property, or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state or a territory or of the United States. In the case at bar it will be remembered that the act of bankruptcy alleged in the petition filed on August 15, 1905, was that the millinery company committed an act of bankruptcy, because of its insolvency a receiver had been appointed by the state court and put in charge of its property. This is just as much an absolute act of bankruptcy as the making of a general assignment for the benefit of creditors and therefore those authorities which deal with general assignments for the benefit of creditors as an act of bankruptcy are equally pertinent to the other act of bankruptcy, viz: where because of insolvency, a receiver is put in charge of the property of the bankrupt.

It has been repeatedly held under the present, as well as under former, bankruptcy acts that the making of a general assignment for the benefit of creditors is a transfer of property by the bankrupt for the purpose of hindering, delaying and defrauding creditors and therefore void.

It must be conceded that if the making of a general assign-

ment for the benefit of creditors is a transfer of property for the purpose of hindering, delaying and defrauding creditors, that the appointment of a receiver by a state court with the consent of the bankrupt company must have the same effect.

In re Gutwillig, 90 Fed. 475, the court had under consideration the effect of the making of a general assignment and held the same to be void, because (1) incompatible with the purpose and policy of the bankruptcy law and the rights of creditors thereunder, to appointment of a trustee and the supervision of the assets in bankruptcy; (2) because in fraud of creditors within Section 70, of the act, as the assignment deprives creditors of the important advantages secured to them under the Act of 1898; and (3) because if not voidable, the clause of section 3 making such an assignment *ipso facto* an act of bankruptcy would be practically nullified and rendered of no use to creditors.

The court in the opinion said:

"The object of the bankruptcy act is declared 'to be to establish a uniform system of bankruptcy throughout the United States.' The most fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt's property among his creditors, and to do this by means of the agencies created by the act. * * * From the moment an act of congress establishing a uniform system for the administration of an insolvent's estate takes effect, every local or private system for the administration of the same assets, whether originating in the state statutes, or in the debtor's common law, power to transfer his property, and regulate it, as in this state, by state law, *is necessarily superseded* provided the bankrupt act is invoked by creditors within the statutory period of limitation. *Both systems operate side by side as respects the same estate; the one must necessarily supersede the other;* and the state and voluntary systems must yield to the system established by congress pursuant to the constitution. Voluntary assignments of all a debtor's property in trust for creditors, are just as incompatible with the purposes of the bankrupt act as state insolvent systems, and for precisely the same reasons, viz: because if allowed to stand as against a trustee in bankruptcy they defeat the most essential elements of the bankrupt law; viz: the distribution of the debtor's assets in the manner prescribed by the bankrupt act, and through the agencies

to which that act commits them. Creditors are vested by the act itself with a right to have the bankrupt's assets administered not only in accordance with the act, but through the instrumentalities and under the supervision which the act provides."

The court further on in the opinion says:

"The provision of the present act making voluntary assignment *ipso facto* an act of bankruptcy, in accordance with the original doctrine, could not have been intended as a mere vain and empty declaration of no value to creditors. These words, on the contrary, can mean no less in the statute than they mean in prior decisions, viz: that both the bankrupt and the estate sought to be assigned in fraud of the act, becomes thereby *instanter subject to the operation of the bankrupt law.* Upon such an assignment, creditors are authorized to proceed *instanter* against a debtor as under the old law."

So, where a receiver is placed in possession of a debtor's property because of insolvency, immediately the right arises in the creditors to have the property subjected to distribution in the bankruptcy court, and if the state court appoints a receiver, as was done in the case at bar, because of insolvency, and he is placed in charge of the bankrupt's property, it does so knowing that by that very act the right is given to the creditors to nullify that act of the court and to subject the property to distribution under the provisions of the bankruptcy act.

It is just as much a fraud on the creditors to have a state court appoint a receiver and place him in charge of the assets of an insolvent, as it is for the insolvent to make a general assignment for the benefit of his creditors. In either case, the creditors are deprived of the right which they have under the bankruptcy law.

In re Gutzwillig, 92 Fed., 337, the Circuit Court of Appeals of the 2nd Circuit had under consideration the effect of a voluntary general assignment for the benefit of creditors, and it was there held that where a general assignment is made either with or without preference within four months prior to the filing of

a petition in bankruptcy against a debtor, that the same is a fraud upon the bankruptcy act and made with intent to hinder, delay and defraud creditors, because its necessary effect is to defeat the operation of the bankruptcy act and the rights of creditors to such an administration of the assets as that act provides, and is therefore void as against a subsequently appointed trustee in bankruptcy, under section 67 of the bankruptcy act of 1898.

The court said:

"The general purpose of bankruptcy laws and of the present act is not only to administer the assets of insolvent debtors on the principles of equity, but to secure that result by giving to the creditors and not to the debtor, the selection of the person to be entrusted with the administration. To permit the administration to be committed by the insolvent debtor, who is on the heels of an adjudication of bankruptcy to a trustee selected by himself, and thus be wholly withdrawn from the supervision of the bankruptcy court is irreconcilable to any reasonable view of the purpose of such legislation. Hence, it has been almost uniformly adjudged *that any disposition of his property by a debtor* intended to accomplish that purpose is a fraud upon the creditors who have a right to invoke its protection. That such disposition is not one which is fraudulent in common law is immaterial. It suffices if its necessary effect is to defraud, hinder or delay creditors in their rights and remedies under the bankruptcy law."

It was further held in that case that the bankruptcy court had jurisdiction pending the hearing on the petition in bankruptcy filed against a debtor to enjoin the assignee from disposing of or interfering with the property transferred to him under a general assignment.

In re Tune, 115 Fed., 906, the court at great length discussed the question of jurisdiction of State and Federal Courts with reference to insolvent's estates and the administration thereof. The rule as laid down by the court is stated in the 6th and 11th paragraph of the *syllabi* and is as follows:

"When the only right of possession of a state court of attached property is based on an atachment lien which is annulled by an adjudication in bankruptcy, the state court loses all juris-

diction of the *rem,* which is transferred into the exclusive jurisdiction of the court of bankruptcy. There is no longer any right of possession in an officer of the state court, *who then holds as bailee for the person rightfully entitled to possession and becomes a trespasser if he fails to deliver on proper demand.*

"In cases of concurrent jurisdiction the court first obtaining possession of the property administers it; but where that court loses jurisdiction, and it is transferred by operation of valid laws to a court of the United States, which *has exclusive jurisdiction of the subject-matter, the question becomes one of obedience to the paramount authority of the constitution,* and comity can have no influence in determining the right."

In re Lengert Wagon Co., 110 Fed., 927, was a case where a receiver was appointed by the state court because of the insolvency of a corporation, and thereafter a petition in involuntary bankruptcy proceedings was filed against the corporation to have it adjudged a bankrupt. It was contended that inasmuch as the state court through its receiver had obtained jurisdiction over the property first, that its jurisdiction could not be disturbed by the bankruptcy court. The court, in passing upon the case, said:

"But the proceeding in the state court is one incident to the insolvency of the corporation, and it seems to be well settled that the bankruptcy act gives *exclusive jurisdiction to the United States Courts in such matters where proceedings are properly instituted, and ousts the state courts of all jurisdiction with respect to the possession or distribution of insolvents' estates. Tua vs. Carrier,* 117 U. S., 201; *In re Smith* 92 Fed., 135; *In re Independent Ins. Co.,* Fed case No. 7018; *In re Thornhill vs. Bank,* Fed. case No. 13922; *Griswold vs. Pratt,* 9 Metz., 16; *In re Storm,* 103 Fed., 618."

In re Knight, 125 Fed., 35, the rule announced by the court is stated in the syllabus as follows:

"When a general assignment for the benefit of creditors is made by a debtor, the same being an act of bankruptcy, the right immediately arises in his creditors to have his estate administered under the bankruptcy law; and where the enforcement of this right is demanded by a proper proceeding within four months after its inception, *no action by any court in any suit brought after the commission of the act of bankruptcy can defeat it, without*

the consent of the bankruptcy court whose jurisdiction is exclusive, and on the making of an adjudication relates back to the act of bankruptcy."

In the case at bar, it will be recalled that the act of bankruptcy was committed on August 12. Appellants had full knowledge and notice of the filing of the petition, on August 15, and took no steps either to rescind the contract of sale or to pursue the property sold to the bankrupt company until August 21, 1905. Under the authorities above cited, we think the rule is well established and clearly laid down that the appointment of the receiver by the state court being itself an act of bankruptcy, and the transfer of property to hinder, delay and defraud creditors within the meaning of the bankruptcy law, and applied to the case at bar, that after that act was challenged by the filing of a petition in bankruptcy, the state court had no right to make any order with reference to the property inconsistent with the administration thereof under the bankruptcy law, *and that court through its receiver was holding the property as bailee for the bankruptcy court or its officers thereafter to be appointed or elected.* And therefore the state court had no authority, right or jurisdiction to make the order permitting appellants to bring a replevin suit against its receiver and the bankrupt company. That order, as well as the bringing of the replevin suit was an absolute nullity and no rights could be conserved by the appellants thereunder.

As was held in the case of *Bank vs. Sherman*, 101 U. S., 406, *supra*, "*those* who dealt with its property in the interval between the filing of the petition and the final adjudication, did so at their peril." Appellants went into the state court, obtained the order, and brought their replevin suit, knowing that the state court had no right to grant the order, that appellants had no right to bring the replevin suit, and had no right to intermeddle in any way with the property belonging to the bankrupt company and in its possession or the possession of the receiver

in the state court, who was holding it as bailee for the bankruptcy court, without first applying to the bankruptcy court for permission to do so, and obtaining its consent thereto. Under these circumstances the entire proceedings with reference to the replevin suit were illegal, unauthorized, null and void and are unavailing as a basis upon which appellants can bottom a right of recovery in the case at bar.

III.

Throughout appellants' entire brief the argument is apparent that they contend, the bankruptcy court had no right to grant the order of injunction made on December 1, 1905, whereby appellants were perpetually restrained and enjoined from prosecuting the replevin suit in the state court. As heretofore stated, the right of the court to grant the injunction cannot be questioned in this proceeding at this time for the reason that no appeal was taken from that order and the same is final and conclusive on appellants and all other parties concerned in this matter. Aside, however, from this, it is well settled not only under the present bankruptcy act, but under the former bankruptcy acts that the bankruptcy court had the undoubted right to grant the order of injunction.

A very similar case to the one at bar was under consideration by the court *in re Mertens et al.*, 131 Fed., 507, which was a case where the seller of goods which had been delivered to the buyers prior to the institution of bankruptcy proceedings against them under took to rescind the sale for fraud after the bankruptcy proceedings were instituted and applied to the bankruptcy court for leave to commence a replevin action for the goods in the state court against the receiver in bankruptcy and after such petition was denied, again applied for an order directing the receiver to set aside and hold the goods in question for petitioners, which

was also denied. It was held that such seller thereby became a party to the bankruptcy proceedings and was bound to prosecute its claim to the goods in the court where such proceedings were pending. Thereafter the receiver in bankruptcy was appointed trustee and the goods were sold by order of the court. The claimants brought a suit in the state court against the trustee for conversion. It was held that the bankruptcy court had jurisdiction under Section 720 Revised Statutes of the United States to enjoin the claimant from prosecuting its case in the state court.

The facts in that case in many respects are similar to the facts in the case at bar. No attempt was made to rescind the sale until after the petition in bankruptcy was filed, the same as in the case at bar. An application was made to the bankruptcy court to bring a replevin suit in the state court and also to segregate the property from the balance of the assets belonging to the bankrupt company, both of which orders were denied and unappealed from.

Afterwards the trustee by order of the bankruptcy court sold the property claimed by the intervenors in that case together with the balance of the assets in his hands belonging to the bankrupt estate. No attempt had been made to rescind the contract of sale until after the petition in bankruptcy was filed. The court held that it had clearly the right to enjoin the proceedings in the state court, and in the course of the opinion said:

"If the authority and jurisdiction of this court in bankruptcy is paramount and superior to that of the state court, and it has jurisdiction to determine conflicting claims to property forming a part of the estate of the bankrupt at the time the petition in bankruptcy is filed and this property concededly was a part of the property of the bankrupt at that time, (for the sale had not been rescinded) then this action of the state court should not be permitted to proceed further, for a judgment that either the receiver or trustee has converted this property would be an adjudication by the state court that this court in bankruptcy had no authority or jurisdiction to direct its officers to take possession of and sell the property. The sale to the bankrupt was not void; only void-

able. * * * (Citing authorities.) This is not a case where the receiver or trustee has taken and held and disposed of property which was outside of the possession and control and apparent ownership of the bankrupt at the time of the filing of the petition in bankruptcy, in which case this court should not and would not interfere."

So in the case at bar, the property sold by appellants was in the custody and control and mingled with and formed a part of the mass of the property of the bankrupt company, at the time of the filing of the petition, and the bankrupt company could have sold and conveyed the same and passed a good title thereto. Hence, under Section 70 of the Bankruptcy Act, the trustee, when elected, took title to that property, and it was therefore such property over which the jurisdiction of the Federal Court attached, the moment the petition in bankruptcy was filed. And the bankruptcy court had the undoubted right under the general equity powers conferred upon it by the bankruptcy law to protect the property from interference therewith by injunction or otherwise.

The jurisdiction of the bankruptcy court to grant the order of injunction is fully sustained by the following authorities, in addition to those above mentioned:

In re Gutman & Wenk, 114 Fed., 1009.
Dietszch v. *Hurdekoper*, 103 U. S., 494.
Chapman v. *Bank of Providence*, 67 Fed., 833.
James v. *Central Trust Co.*, 98 Fed., 489.
Mueller v. *Nugent*, *supra*.

IV.

The appellants contend that they are entitled to have their claim allowed as a preference against the estate, because they had a *lien* against the property.

Of course, it is also true that they make the further assertion

in their brief that by reason of their *ownership* of the property they are entitled to have to have the claim allowed as a preference, and again, they asserted that the trustee is holding a *trust fund* which belongs to them. While it is difficult for the trustee to keep track of the various claims set up by appellants which have varied every time the question came before the court, yet the fact remains that appellants took no steps whatever in the bankruptcy court to have the property which they sold to the bankrupt company segregated from the balance of the assets and stood by and permitted the receiver of the state court to commingle that property with the balance of the property of the bankrupt company, and permitted the receiver in bankruptcy to sell the entire mass, which may have included some of the property which appellants sold to the bankrupt company, without having the same segregated from the balance of the mass, and without having the same sold and the proceeds held separate from the balance. Under these facts whether the appellants claim as owners, as lienees, or *cestui que trusts*, they are not entitled to have their claim allowed as a preference because, as held by the referee, *there is absolutely no way to determine how much of their property was in the mass of assets, when they were sold by the receiver in bankruptcy or how much was received therefor.* If, therefore, they are *lienees*, they are entitled to only the *amount which was received for the property covered by the lien.* If they are owners, they are only entitled to the *amount which* the property brought which belonged to them. If they are *cestui que trusts*, they must *show the amount of the trust fund.* Neither of which was done in this instance.

In the case of *Kaiser* v. *Weessel*, 128 Fed., 281, decided by the Circuit Court of Appeals of the Third Circuit, the court had under consideration a similar question to that at bar. In that case it seems the claimant was the landlord of the building occupied by a saloon keeper who was the holder of liquor license and the owner of fixtures in the leased premises. The landlord by virtue of his lease,

claimed a lien on the license and fixtures. The bankrupt also had a stock of liquor. By order of the court, the entire assets including the stock, fixtures and license were sold in bulk by the trustee. Afterwards the landlord intervened in the bankruptcy court and asked that his lien to the amount of $1,000 be allowed as a preferred claim. The court said:

"The referee disallowed the claim on the ground that it was impossible to say how much of the fund produced by the sale of the license and how much was the product of the stock and fixtures. I agree with this conclusion which accords with two previous decisions in this district. * * * It is certain that no apportionment of the $3,500 can be made with any degree of accuracy; for while it is true that only $1,000 was bid for the license separately, and therefore it may be contended with some degree of plausibility that the remaining $2,500 was bid for the stock and fixtures, yet it may also be contended and with equal plausibility that as only $144.-61 was bid for the stock and fixtures separately, the license must have produced the balance of $3,500."

It was therefore held that the claim was rightfully disallowed by the referee; that it was the duty of the claimant to object to the sale of his property with the balance of the assets belonging to to the bankrupt estate

In re Klapholz et al, 113 Fed., 102, a similar question was before the court in which, in the course of the opinion, the court said:

"Conceding for present purposes, that the claimant had a lien for the full amount of his debt upon the clothing shipped October 2, 1901, I am nevertheless of opinion that he cannot be awarded priority of payment out of the fund in hand for the following reasons:

"The fund was produced by the sale of all of the bankrupt's personal property, including the clothing manufactured by the claimant, clothing manufactured by other persons, and various other articles; and there is no evidence concerning the price for which the suits in question were sold. The claimant had notice of the sale, which was made by the receiver under the order of court, and was afterwards duly confirmed without objection; and he should have asked the court to direct this clothing to be sold separately, in order that the fund thus produced might be ear-

marked, and the validity of his claim upon it be considered. The court had no knowledge that he was asserting a lien for the manufacture of these goods, and as they had passed out of his possession into the custody of the receiver, it was his duty to make seasonable claim to priority of payment, otherwise he must be held to have taken the risk that the goods might be sold in such a manner that the proceeds might be unextinguishably mingled with the proceeds of the other property of the bankrupt."

While as stated appellants at different stages of these proceedings have claimed as lienees, owners and *cestui que* trusts, yet in their assignments of error in their brief they complain only of the refusal of the court in disallowing their claim as a preference "on account of being a *lien* on the funds in the possession of the trustee in bankruptcy," and are hence limited in this appeal to a single claim. The court will not consider errors not specified in appellant's brief. This is provided for by the rules of this court.

V.

The additional claim is set up by appellants in their brief that the receiver in bankruptcy was guilty of conversion of their property sold to the bankrupt company. No authorities are cited by appellants which support the theory that an officer of a court, such as a receiver, can be guilty of conversion when he acts strictly in obedience to and in accordance with the orders and directions given to him by the court.

In the case at bar the property and assets of the bankrupt company were sold under order of the bankruptcy court, and whatever Mr. Blake, as receiver in bankruptcy, did, was done in pursuance of and under the authority of that order.

It is the contention of the trustee that he cannot be held guilty of conversion while acting as receiver in bankruptcy when all of his acts, with reference to the estate of the bankrupt company, were done in accordance with the orders of the court. In

other words, that as receiver in bankruptcy and acting under the order of the court in selling the assets of the property of the bankrupt company, even though some of the goods sold by appellants may have been mingled with the mass of the other property, were included in such sale, he cannot be held liable for conversion.

This principle is clearly held in the case *in re Mertens*, 131 Fed., 507, *supra*. Also in *Tapscott vs. Lyon*, 103 Cal., 297; 37 Pac., 225, in which it is said:

"But if he (receiver) is lawfully in possession of property claimed to belong to the insolvent, he will be regarded as the servant of the court, and even adverse claimants will not be justified in disturbing his possession without leave of the court. Nor can he be made responsible in an action for the value of such property by such person. The custody is that of the court. * * * The defendant is sued as a trespasser, and his plea is that in taking the goods he acted as receiver; that his acts were lawful and that he cannot therefore be held as a trespasser, and has disposed of them under express direction of the court. I think this position must be sustained. He was then but a servant, executing the commands of the court."

High on Rec., Secs. 139-145.

Beach on Rec., 304.

But aside from this, how can it be said that the receiver in bankruptcy was guilty of conversion when the evidence fails to show that any of the goods sold by appellants to the millinery company came into his possession? He certainly cannot be held liable for the act of the receiver of the state court whom appellants permitted to retain possession of such goods.

VI.

Appellants in their brief lay great stress on a supposed agreement which they allege was entered into with the attorneys representing the trustee in bankruptcy. The situation was this:

The trustee after his election and qualification as such brought his bill in equity in the bankruptcy court asking that appellants be

restrained and enjoined from further prosecuting their replevin suit in the state court. Upon due consideration the bankruptcy court granted a temporary injunction, not only against the appellants but against I. J. Ringolsky, their attorney. A copy of the restraining order was served upon Mr. Ringolsky. Therefore, it cannot be denied but what appellants as well as their attorney had actual notice and knowledge of the granting of the restraining order, and under all of the authorities, were bound thereby. Upon the return day of the temporary injunction appellants appeared by their attorney I. J. Ringolsky and filed a motion to dissolve the temporary injunction because the bankruptcy court had no jurisdiction to grant the same, and that they were rightfully in the state court with their replevin suit. And at their request, the hearing upon the merits was continued and was afterwards taken up on December first. There is no evidence that between the granting of the temporary injunction and the order made December 1st, when the temporary injunction was made perpetual, any negotiations whatever took place between appellants and the trustee, although the referee, in his findings, finds that such negotiations were had, which finding is entirely unsupported by any evidence. On that date, to-wit, December 1, 1905, appellants presented a form of order to the attorneys representing the trustee, which form was o. k.'d by the latter attorneys. It will be borne in mind that all the trustee was after and all he was asking for was that the prosecution of the replevin suit in the state court be enjoined. That is what the order o. k.'d did. There was no further agreement. It was not an agreement in the sense that it is claimed in the brief of appellants. The attorneys were willing that the court might sign the order. They were representing an officer of the court and had no right to make any agreements affecting the rights of the creditors in the bankruptcy proceedings or affecting the estate in bankruptcy without being authorized to do so by the court whose agent they represented.

When the order was presented to the court, the court refused to sign that order, but made an order which the court drew himself. There is no material difference in the two orders. What was done by the order was to perpetually enjoin the prosecution of the replevin suit in the state court. Irrespective of anything contained either in the proposed order o. k.'d by the attorneys for the trustee or in the order made by the court, appellants had the right to present their claim in any form they desired to the referee in bankruptcy. And the trustee had the right to set up any defense to such claim that he saw fit, or the circumstances and facts in the case would warrant. Neither by the proposed order, or the order made by the bankruptcy court, in making the injunction perpetual, were the rights of the appellants enlarged or the rights of the trustee in bankruptcy, with reference to defenses thereto, restricted in any way whatever by any conditions or provisions therein contained.

The district court in its opinion had the following to say with reference to the order.

"For some reason unknown to the law, counsel before the referee was permitted to put in evidence, over the trustee's objection, an order drawn up by claimants' counsel in the form of an order he wished the court to make on the return day of the hearing of the temporary restraining order, which was o. k.'d by counsel representing the receiver. As that was properly a matter *in pais* between counsel, it was not binding on or recognized by the court. The court made its own order, making the injunction perpetual, and by that order, it alone speaks. As counsel for claimant acquiesced therein, it precludes any recourse to the antecedent doings of counsel respecting this matter. With or without the entry of appearance of the claimants to the injunction suit they were bound by the temporary injunction as their counsel had notice thereof.

"*In re Charles Nesbit*, recently decided by this court and not yet published (now reported 111 Fed., 279) the order made in the injunction, stating that it was without prejudice to the right of the claimants to present their claim to the referee in such form as they might choose, with the right of the trustee to defend the same, neither enlarged nor restricted any right the

claimants or the trustee had in respect to the validity of the claim.'" (Rec., 145).

VII.

If, however, all the objections to appellant's recovery heretofore noted are waived, the question then arises whether they are entitled to recover on the theory that the trustee in bankruptcy has in his possession a trust fund belonging to them. The evidence clearly shows, and the referee so found, that it was impossible to say what portion, whether in kind or in an altered form, of the property sold to the bankrupt company by appellants, came into the hands of the receiver in bankruptcy or yet how much was received therefor at the sale of the assets.

The district court held in its opinion that the appellants failed entirely to trace any portion of such property into the possession of the receiver in bankruptcy, and that as a condition precedent to their right to recover, they must show that their property either in kind or its proceeds in some altered form came into the hands of the receiver or trustee in bankruptcy, and that the funds in his hands were swelled thereby to such an amount.

The district court in its opinion discussed this proposition with his characteristic thoroughness, to which it would be indeed difficult to add anything of importance.

We will be content, therefore, inasmuch as the district court has so ably reviewed the authorities pertaining to this question in his opinion to submit this phase of the case to the court on the opinion as rendered by the district court, *and to which ruling no error is assigned in appellant's brief.*

In conclusion we submit:

1. The bringing of the replevin suit in the state court was an illegal, unauthorized and unwarranted act, and appellants con-

served no rights thereby, and it cannot be the basis of recovery herein.

2. The order of injunction made by the district court on December 1, 1905, cannot be attacked in this proceeding, but is final and conclusive of the question that said replevin suit was wrongfully brought by appellants.

3. That by their laches in presenting their claim to the bankruptcy court, appellants must be deemed to have waived their right to follow the goods even if they had such right.

4. That under the evidence and facts in this case appellants had no right to rescind the contract of sale as there was no such fraud on the part of the millinery company as would justify a rescission, and that they did not as a matter of fact, rescind the sale or take the necessary legal steps to do so.

5. That under no theory advanced by appellants are they entitled to have any part of their claim allowed as a preference.

The judgment of the district court was right and is amply sustained by the facts in the case, and by the authorities as hereinbefore cited, and should be approved by this court.

Respectfully submitted,

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Attorneys for Appellee.

BLAKE, TRUSTEE IN BANKRUPTCY, *v.* OPENHYM.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 71. Submitted January 11, 1910.—Decided February 12, 1910.

The judgment in this case that the vendor of goods sold to the bankrupt had a right to, and did, rescind the contract of sale on the ground that the goods were obtained by the bankrupt's fraud, and that the rescission was seasonably made on that ground, involves no provision of the bankruptcy law, but depends on principles of general law, and an appeal will not lie to this court from the judgment of the Circuit Court of Appeals. *Chapman* v. *Bowen*, 207 U. S. 89.

Where, after writ of replevin, the state court turns the goods over to the receiver, who so receives them, on the express condition that he assume the liabilities incurred in that court which has held that the liability under the re-delivery bond was incurred for benefit of the estate, no provision of the bankruptcy act is involved that would make the decision reviewable in this court on writ of error.

Where, after replevin, the paramount authority of the bankruptcy court is conceded and the replevin suit is considered only as evidence of rescission and identification of goods, no provision of the bankruptcy law or jurisdiction of the bankruptcy court is involved on which a writ of error from, or an appeal to, this court can be based. 157 Fed. Rep. 536, affirmed.

THE facts are stated in the opinion.

Mr. Alexander New and *Mr. Edwin A. Krauthoff*, with whom *Mr. J. V. C. Karnes*, *Mr. Samuel Feller*, and *Mr. Arthur Miller* were on the brief, for appellant:

Under the bankruptcy law of 1867 this court assumed jurisdiction, *inter alia*, of the following cases on writs of error to state courts: *Forsythe* v. *Vehmeyer*, 177 U. S. 177; *Sharpe* v. *Doyle*, 102 U. S. 686; *Factors' &c. Co.* v. *Murphy*, 111 U. S. 738, 741; *Mays* v. *Fritton*, 131 U. S. cxiv; *Dushane* v. *Beall*, 161 U. S. 513, 518; *Williams* v. *Heard*, 140 U. S. 529; *Traer* v. *Clews*, 115 U. S. 528, 533, 534; *New Orleans &c. R. R. Co.* v. *Delamore*, 114 U. S. 501, 506; *Palmer* v. *Hussey*, 119 U. S. 96; *Hennequin* v. *Clews*, 111 U. S. 676.

Under the bankruptcy law of 1898, this court has assumed jurisdiction in the following cases, coming to this court under the provision of § 25*b*, from the Circuit Court of Appeals: *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438; *Pickens* v. *Roy*, 187 U. S. 177; *Page* v. *Edmunds*, 187 U. S. 596; *Jaquith* v. *Alden*, 189 U. S. 78; *New York Co. Nat. Bank* v. *Massey*, 192 U. S. 138; *Hewit* v. *Berlin Mach. Wks.*, 194 U. S. 296; *Western Tie & Timber Co.* v. *Brown*, 196 U. S. 502; *Whitney* v. *Dresser*, 200 U. S. 532; *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Conboy* v. *First Nat. Bank*, 203 U. S. 141; *New Jersey* v. *Anderson*, 203 U. S. 483; *Hiscock* v. *Varick Bank*, 206 U. S. 28; *Gazlay* v. *Williams*, 210 U. S. 41.

Under the bankruptcy law of 1898, the following cases have been reviewed by this court on writ of error to a state court: *Dunbar* v. *Dunbar*, 190 U. S. 340; *Kean* v. *Calumet Canal*, 190 U. S. 452; *Tinker* v. *Colwell*, 193 U. S. 473; *Crawford* v. *Burke*, 195 U. S. 176; *Kaufman* v. *Tredway*, 195 U. S.

271; *Birkett* v. *Columbia Bank*, 195 U. S. 345; *Cramer* v. *Wilson*, 195 U. S. 408; *Bullis* v. *O'Beirne*, 195 U. S. 606; *Wetmore* v. *Markoe*, 196 U. S. 68; *First Nat. Bank* v. *Lasater*, 196 U. S. 115; *Thompson* v. *Fairbanks*, 198 U. S. 516; *Humphrey* v. *Tatman*, 198 U. S. 91; *Hammond* v. *Whitredge*, 204 U. S. 538.

An examination of the opinion in the Circuit Court of Appeals (157 Fed. Rep. 536), shows that the result reached depended upon the force and effect given to the action in replevin, which was instituted after the petition in bankruptcy was instituted; in other words, the question in the case was as to the force and effect of a proceeding in bankruptcy followed by a subsequent petition in replevin. This clearly presents a Federal question.

The authority relied on by the appellees in their motion to dismiss has no bearing on the question presented in the case at bar.

Since the bankruptcy law was enacted in 1898, *Chapman* v. *Bowen*, 207 U. S. 89, is the only case in which this court has declined to assume jurisdiction on an appeal or a writ of error arising under the bankruptcy law.

Mr. Benjamin N. Cardozo, *Mr. T. J. Ringolsky*, *Mr. Morris J. Hirsch* and *Mr. David L. White*, for appellees:

This court will not retain jurisdiction of this case on this appeal, as the appeal was prayed for and allowed under § 25*b* of the bankruptcy act of July 1, 1898, and the record does not show that such questions were involved in the decision of the case by the Court of Appeals as are necessary in order to give jurisdiction to the Supreme Court of the United States on appeal under § 25*b*. *Chapman* v. *Bowen*, 207 U. S. 89.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This appeal was taken to review the decree of the Circuit Court of Appeals reversing the disallowance of a debt due to

Openhym & Sons as a preferential claim against the estate of Walkeen-Lewis Millinery Company (we shall call it the millinery company).

A motion to dismiss is made on the ground that the question involved is not one which could be brought here on writ of error from the highest court of a State, and that no Justice of this court has certified that a determination of the question is essential to a uniform construction of the bankrupt act throughout the United States.

The facts, which we condense somewhat from the findings of the Court of Appeals, are, that the millinery company, then being in the millinery business at Kansas City, Missouri, obtained, by false representations of its liabilities, goods of the value of three thousand one hundred and twenty-five dollars and seventy cents from Openhym & Sons of New York city. Subsequently, a suit was brought against the millinery company by another creditor and a receiver was appointed of all its property. The receiver of the property forthwith took possession, and under the orders of the court continued its sale. A few days afterwards certain other creditors of the millinery company filed a petition in the District Court of the Western District of Missouri to have the company declared a bankrupt. Four days later the company admitted its insolvency and consented that it be declared a bankrupt.

Openhym & Sons, the appellees, asserting that their goods had been obtained from them by the millinery company by false representations of its solvency, demanded possession of the goods from the state court's receiver. Possession was refused, and Openhym & Sons, having obtained from the state court permission to do so, brought an action of replevin against the receiver and the millinery company. "Process was duly served on both defendants. In the execution of the replevin writ but $2,582.80 worth of the goods obtained from Openhym & Sons were found. The sheriff, in executing the writ, separated the goods so found from the remainder of the

stock then in possession of the state court receiver, and took them into his own possession. The receiver thereupon gave a re-delivery bond, resumed possession of the goods, put them back into the stock, and continued sales therefrom."

On September 23, 1905, the millinery company was adjudged a bankrupt. Before the date of the adjudication no receiver had been appointed by the District Court, and no order had been made affecting the property in the possession of the state court or the continuance of the sales thereof by the state court receiver. On the day of the adjudication of bankruptcy Daniel F. Blake, appellant, was appointed receiver in bankruptcy and was directed to apply to the state court for an order on its receiver for the possession of the property. He was further directed that before taking possession, he should request the state court to fix and determine the liabilities which its own receiver had incurred for the benefit of the estate. "The order of direction to the receiver in bankruptcy contained this clause: 'The liabilities incurred by the said receiver appointed by the state court shall be assumed and paid by the receiver herein.' "

On September 25, 1905, the state court stated the liabilities incurred by its receiver, and in addition thereto recited the proceedings in the replevin action brought by Openhym & Sons, and found that whatever liability had been incurred under the re-delivery bond had been incurred for the benefit of the estate. The court then ordered the delivery of the property to the receiver in bankruptcy upon the conditions that the latter should assume and pay the liabilities recited and the liability arising under the re-delivery bond. It was not shown what part of the goods in controversy actually passed into the possession of the receiver in bankruptcy, but it was shown that all of the stock remaining unsold, and all of the proceeds of sales by the state court receiver, largely in the form of customers' accounts, were, less expense of conducting the business, turned over to the receiver in bankruptcy.

October 2, 1905, the receiver in bankruptcy sold all of the property of the millinery company; on the thirteenth the receiver was selected as trustee; on the twenty-seventh the District Court ruled Openhym & Sons to show cause why they should not be enjoined from prosecuting the action of replevin and temporarily enjoined them from doing so; December 1 the temporary injunction was made permanent.

On December 10, 1905, a dividend upon the claims against the estate of the millinery company was declared, but its payment left the greater portion of the estate in the hands of the trustee. Up to that time Openhym & Sons had not intervened and presented their claim for preferential payment, but this fact had no effect upon the declaration of the dividend and no creditor was prejudiced thereby.

December 21, 1905, Openhym & Sons intervened and presented their claim for $2,582.80 as a preferred one. On March 24, 1906, it was found by the referee to be entitled to be allowed as such. Upon petition for review, the District Court reversed the finding. Upon appeal the Circuit Court of Appeals substantially found the above facts and reversed the decree of the District Court. 157 Fed. Rep. 536.

The conclusions of law of the Circuit Court of Appeals were as follows:

"1. There were sufficient grounds for a rescission of the sale by Openhym & Sons, the right of rescission was seasonably asserted, and the right was not impaired or destroyed by the commencement of bankruptcy proceedings against the vendee who obtained the goods by fraud. The receiver and trustee in bankruptcy had no greater right or title to the goods in controversy than the bankrupt had.

"2. It was competent for the bankruptcy court to permit the prosecution of the replevin action in the state court for the recovery of the goods. The continuance of such prosecution was lawful up to the time it was forbidden by the injunction of the bankruptcy court. The commencement and prosecution of that action, though subsequently enjoined, was avail-

able to Openhym & Sons as an act of rescission, and the proceedings therein could properly be resorted to in ascertaining what part of the goods sued for was in the possession of the state court and afterwards with proceeds of sales went into the possession of the bankruptcy court.

"3. There was no such delay by Openhym & Sons in intervening in the bankruptcy proceedings as estopped them from asserting their right to a preferential claim for the value of their goods.

"4. Openhym & Sons are entitled to an order that the trustee pay their claim out of funds in his hands before making further payments to general creditors."

The contention of appellee upon the motion is that the bankruptcy law limits the right of appeal to two classes of cases, in neither of which, it is further contended, the case at bar falls: (1) where the amount in controversy exceeds a thousand dollars and the question involved is one that might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; (2) where a Justice of the Supreme Court of the United States shall certify that the determination of the question involved is essential to a uniform construction of the act throughout the United States.

The consideration of the second ground we can immediately dismiss, as there is no such certificate. Of the other, or first ground, it is urged that *Chapman* v. *Bowen*, 207 U. S. 89, is decisive. In that case the facts were that there was borrowed from Bowen, on two different occasions, the sum of five thousand dollars, for which two promissory notes were given, signed by the firm of A. McCoy & Company and by the individual names of Alfred McCoy and Thomas McCoy, the proceeds of the transactions going into the partnership business. The firm and the individuals became bankrupt, and the notes were presented as claims against the firm and allowed to the extent of thirty per cent. A claim was presented for the balance against the estate of Alfred McCoy, and dis-

allowed by the referee, whose decision was affirmed by the District Court. The decision was reversed by the Circuit Court of Appeals. *In re McCoy*, 150 Fed. Rep. 106. An appeal was allowed to this court by a judge of the Circuit Court of Appeals, which, on motion, was dismissed, on the ground that a writ of error from the highest court of the State to this court could not be maintained, because no validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question; nor the validity of a statute of, or any authority exercised under, any State, on the ground of repugnancy to the Constitution, treaties or laws of the United States; nor was any treaty, right, privilege or immunity claimed under the Constitution or any treaty or statute or commission held or authority exercised under the United States, and decided against it. It was further said that "the decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act."

We think that case controls this, and that the cases cited by appellant, of which this court took jurisdiction, are not apposite. The determining facts in the case at bar are that the goods were obtained by the millinery company by fraud, and that the sale was seasonably rescinded on that ground. In the decision of this there was involved no provision of the bankruptcy law. Nor is any provision of the bankruptcy law involved in the consideration of the question whether the goods turned over by the state court to the receiver in bankruptcy could be identified as the goods obtained from Openhym & Sons. Surely, as decided by the Court of Appeals, the proceedings in the state court "could properly be resorted to in ascertaining what part of the goods sued for was in the possession of the state court, and afterwards what proceeds of sales went into possession of the bankruptcy court." To these facts must be added the important one that the goods were ordered by the state court to be delivered to the receiver in bankruptcy upon the express condition, and they were

received by him subject to the condition, that he should assume and pay the liabilities incurred in that court, that court finding "that whatever liability was incurred under the re-delivery bond was incurred for the benefit of the estate."

It was from these facts that the Court of Appeals concluded that Openhym & Sons were "entitled to an order that the trustee pay their claims out of funds in his hands before making further payments to general creditors." In this conclusion we cannot see that any provision of the bankruptcy law was involved, so that if the decision had been made by a state court it would have been reviewable here on writ of error.

It is the contention of appellant, however, that the writ of replevin brought by Openhym & Sons and the levy under it "were unlawful and unauthorized acts," and that Openhym & Sons "could not, and did not, conserve any rights thereby." And, further, the appellant says, "it will be observed at the outset that this question goes directly to the jurisdiction of the bankruptcy court over the *res* of the bankrupt after the filing of the involuntary petition in bankruptcy." Putting it another way, appellant says that "the question in the case is as to the force and effect of a proceeding in bankruptcy followed by a subsequent petition in replevin." And, it is insisted, that the result reached by the Court of Appeals "depended upon the force and effect given to the action in replevin," and that, therefore, a Federal question is presented. This, however, proceeds from a misapprehension of the opinion of the Court of Appeals. The paramount jurisdiction of the bankruptcy court was conceded. The replevin suit was considered as showing the purpose of Openhym & Sons to rescind the sale of the goods and as a means of their identification, as we have already pointed out. In holding it competent for those purposes we cannot see how any provision of the bankruptcy law was involved.

The motion to dismiss must therefore be granted.

So ordered.